Date: September 17, 1998

Case No.: 90-ERA-30

In the Matter of:

MARVIN B. HOBBY,
Complainant,

v.

GEORGIA POWER COMPANY,
Respondent,

APPEARANCES:

MICHAEL D. KOHN, Esq.
STEPHEN M. KOHN, Esq.
For Complainant

JAMES JOINER, Esq.
JOHN LAMBERSKI, Esq.
For Respondent

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

This proceeding arises from a claim under Section 210 of the Energy Reorganization Act ("the Act"), 42 U.S.C. 5851 (1988).

A formal hearing was held in this case on August 4-8, 1997, and October 6-10, 1997, in Atlanta, Georgia and Washington, D.C., respectively. Both parties filed post-hearing briefs. The

findings and conclusions which follow are based on a complete review of the entire record[1] in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

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[1]The following abbreviations will be used as citations to the record:
CX - Complainant's Exhibits
RXR - Respondent's Exhibits on Remand
RX - Respondent's Exhibits
Tr. - Transcript.
Any citations to the briefs of the parties are to the page number is it appears in WordPerfect 7.0 and not necessarily in the printed copy of the brief provided to the presiding judge.

ISSUES

1. Should any other corporation beside Georgia Power Company be liable for the remedy in this proceeding under the doctrine of joint or single employer?
2. Should Respondent be ordered to reinstate Complainant to the same or comparable employment or in the alternative, ordered to pay front pay to Complainant?
3. What monetary damages should be awarded to Complainant?
4. Is Complainant entitled to any affirmative remedies?
5. Is Complainant entitled to compensatory damages for humiliation, embarrassment and loss of reputation?

STIPULATIONS

Georgia Power Company (hereinafter "Respondent" or "GPC") and Complainant, Marvin Hobby, stipulated to and I find the following facts:

1. The news reports attached hereto as Appendix A and identified as Bates Nos. 16775 through 16798 are the news accounts which discuss Complainant's Department of Labor action against GPC which the parties have been able to locate.
2. As of March 1, 1989, and at the time of his separation from GPC, Complainant's annual salary was $103,104.
3. As of December 1988, Complainant's position level at GPC was Level 20 (10).[2]
4. Had Complainant remained at GPC beyond April 2, 1990, GPC Productivity Improvement Plan (PIP) awards would have been paid to Complainant by March 15 of each year (for the preceding calendar year). Each year, PIP awards are calculated by multiplying the Funding Percent for each year (shown on Appendix B, Bates No. 16281, for the years 1990 through 1996) times the Target Award Opportunity (shown on Appendix C, Bates No.16282A, for 1995 to present, and Bates No. 16283A for prior to 1995) times the midpoint of the salary range of the individual employee. Appendix D attached hereto, Bates Nos. 16286-87, depicts the midpoint for salary ranges of Level 20 through 24 (10 through 12) employees for the period 1988 through March 1, 1997.

[2]After Complainant's termination, GPC reorganized their compensation level distinctions (Tr. 345). Hereinafter, the old level will be in the text with the new level in parentheses.

5. Had Complainant remained with GPC beyond April 2, 1990, GPC's Employee Savings Plan and the Employee Stock Ownership Plan (ESOP) would have constituted another 5.3 % of annual salary which would have been issued to Complainant on March 15th of each year from 1990.

6. The highest GPC Performance Pay Plan (PPP) award paid to GPC employees (expressed as a percentage of salary) for calendar years 1988-1996 are as follows: 1988 - N/A; 1989 - 14.81; 1990 -17.48; 1991 - 15.08; 1992 - 22.75; 1993 - 19.62; 1994 - 21.32; 1995 32.18; 1996 - 25.82. Each of the foregoing payments were made by March 15 of the following year (e.g., 1996 - 25.82% was paid by March 15, 1997). The PPP for each GPC organization for the years 1989 through 1996 was calculated based on the salary range midpoints of each organizations' employees times the PPP Funding Percentages (shown on Appendix E attached hereto, Bates No. 16279). In each GPC organization, some employees could receive PPP awards higher or lower than the Funding Percentage times their salary range midpoints, but the total award budgeted for all employees in any one organization would be limited to the Funding Percentages times the midpoints of the salary ranges of all the employees in such organization. In 1997, GPC began using the actual salaries of employees rather than the salary range midpoints. Had Complainant remained at GPC beyond April 2, 1990, PPP awards would have been paid to Complainant by March 15 of each year (for the preceding calendar year).

7. Complainant earned $3,161 in salary and $717 in business income in 1992, $18, 961 in salary in 1993, $25, 339 in salary in 1994, $25,225 in salary 1995, and $30, 397 in salary 1996. Complainant's annual salary in 1997 corresponds to $32,525.

8. The applicable federal rates (AFR) to be used in calculating interest on Complainant's net monetary damages are listed below. A 3 % underpayment rate must be added to these rates.

10/89 - 3/91:	8%
4/91 - 12/91:	7%
1/92 - 3/92:	6%
4/92 - 9/92:	5%
10/92 - 6/94:	4%
7/94 - 9/94:	5%
10/94 - 3/95:	6%
4/95 - 6/95:	7%
7/95 - 3/96:	6%
4/96 - 6/96:	5%
7/96 - 9/97:	6%

9. Had Complainant remained with GPC beyond April 2, 1990, he would have been

assigned a mid-sized car from 1990 through October 31, 1993. Effective October 31, 1993, GPC discontinued its practice of assigning vehicles to Company officers and managers. At that time Complainant would have received a payment of $7,400 plus $2,957 to cover federal and state taxes on the $7400 payment. Complainant was assessed (as additional income) for his automobile in 1987-1989 as follows: 1987 - $3520; 1988 - $3507; and 1989 - $3442.

10. Had Complainant remained with GPC beyond April 2, 1990, Complainant would have accrued vacation time at the rate of three weeks per year until October 25, 1993, and after that time he would have accrued vacation time at the rate of four weeks per year.

11. Had Complainant remained with GPC through 1995, 1996 and 1997 at Level 20 (10) or higher, the value of the stock grant which Complainant would have received would have been calculated as follows: Stock Grant = salary x grant multiple of .75 divided by stock price (1995 = $21.625; 1996 = $23; 1997 = $21.25); value of stock options are estimated at $2.85 (1995 grant), $3.39 (1996 grant), and $2.73 (1997 grant).

12. The deposition of Mr. James W. Averett, dated October 28, 1996, as corrected on January 7, 1997, constitutes the testimony of Mr. Averett in lieu of his live appearance at the remand hearing.

PROCEDURAL HISTORY

Complainant filed his complaint on February 6, 1990. The Acting Regional Director determined that Complainant had been discriminated against and called for restoration of Complainant to his former position. Georgia Power filed a timely request for a hearing along with a complaint alleging that it had not been afforded a reasonable opportunity to participate in the investigation. On May 25, 1990, the District Director amended the prior findings based on additional information and found that the Complainant's termination from his job with Georgia Power was not based on his having engaged in any protected activity. Complainant filed a timely request for a hearing.

On October 23 to 26, 1990 and November 13, 1990, a hearing took place before Administrative Law Judge Joel Williams. On November 8, 1991, ALJ Williams issued a Recommended Decision and Order in favor of Georgia Power. On August 4, 1995, the Secretary of Labor rejected the Recommended Decision and Order and issued a Decision and Remand Order ordering Georgia Power:

> to offer Complainant reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits, to pay Complainant the back pay to which he is entitled, and to pay Complainant's costs and expenses in bringing this complaint, including a reasonable attorney's fee. This case is hereby REMANDED to the ALJ for such further proceedings as may be necessary to establish

Complainant's complete remedy. Hobby v. Georgia Power Company, 90-ERA-30, at 28 (Sec'y August 4, 1995).

On December 11, 1995, Complainant filed a Petition for Attorneys' Fees and Costs, Motion for a Hearing on Compensatory Damages, and Position on Economic Damages. Respondent filed an opposing pleading. On December 11, 1995, Respondent filed a Motion for an Evidentiary Hearing Upon Remand asserting that there remained unresolved factual issues as to whether Complainant was barred from reinstatement and back pay because of corporate downsizing and reorganizations or by a failure to mitigate his damages and whether a comparable reinstatement position existed. Complainant filed an opposing pleading. ALJ Williams retired on February 2, 1996 and Administrative Law Judge Edith Barnett was assigned to this matter. ALJ Barnett set a hearing for the week of August 19, 1996 and allowed the parties to commence pre-hearing discovery. As a result of discovery disputes, on July 9, 1996 ALJ Barnett postponed the hearing date and issued a new scheduling order. During the pre-hearing discovery period, the parties filed a joint motion to defer discovery concerning attorneys' fees, including a ruling as to whether such discovery would be permitted, until the end of the proceeding. On January 7, 1997, ALJ Barnett granted the parties' motion regarding attorneys' fees. On June 13, 1997, ALJ Barnett re-set the hearing date for August 4 through August 8, 1997.

During pre-hearing discovery, Complainant sought discovery of documents from Georgia Power's parent company, The Southern Company, and from other Southern Company subsidiaries (Southern System). ALJ Barnett, in an order dated July 9, 1996, permitted Complainant's discovery requests over Respondent's objections. On June 3, 1997, Respondent filed a Motion for Summary Decision on the joint or single employer status of the Southern System. On July 31, 1997, ALJ Barnett deferred ruling on this issue until after the completion of the hearing.

Evidentiary hearings were held August 4, 1997 through August 8, 1997 and October 6, 1997 through October 10, 1997. The hearings were supplemented with video-taped testimony taken on October 23, 24 and 27, 1997. On October 20, 1997, ALJ Barnett issued a Scheduling Order for closing the record and filing of post-hearing briefs, which cautioned the parties that their post-hearing briefs were to conform to the following requirements: "(1) arguments shall be objective, discussing all relevant evidence both favorable and unfavorable; (2) explicit references to the record must be included; and (3) arguments shall be limited to those matters remanded to the Office of Administrative Law Judges by the Secretary of Labor's August 4, 1995 Decision and Remand Order."

The record was completed by filings of the parties made on December 31, 1997 and January 15, 1998. Following the unexpected death of ALJ Barnett, this matter was reassigned to me on January 27, 1998. On April 3, 1998, both parties filed post-hearing briefs and followed by reply briefs on May 5 and 7, 1998.

STATEMENT OF FACTS

A. Testimony of Marvin B. Hobby, Complainant

In 1971, Complainant became the director of the Edwin I. Hatch Nuclear Information Center[3]. He obtained this position through an individual who attended one of his classes at Oak Ridge Associated Universities (Tr. 31). His responsibilities at the Center included hiring staff - a custodian and receptionist/tour guide - both of whom were hired through contacts within GPC (Tr. 34). While in this position, no one was hired on the basis of blind resume submission (Tr. 34).

In 1973, Complainant was asked to become assistant to the Ad Hoc Executive Committee[4], formed to improve the financial situation of GPC (Tr. 35). Complainant did not request that he be moved to this position, but was contacted by Mr. McKenzie, a Senior Vice President (Tr. 34, 36). Complainant testified that his working relationship with the individuals on this committee was "excellent" (Tr. 40).

One of the recommendations of the committee was the creation of a Consumer Affairs Department, and Complainant was transferred to the position of Coordinator of Consumer Affairs (Tr. 42). Again, Complainant did not solicit for this position, but was offered it on the basis of his work with the Ad Hoc Executive Committee by either Minors or McKenzie (Tr. 42). The Consumer Affairs Department focused on the relation of the company to its customers (Tr. 43). While in this position Complainant worked closely with the Customer Service Center in Atlanta and the "Division Operations" (Tr. 43-4). Complainant was supervised by Minors and had a good working relationship with him (Tr. 44). He received no negative feedback as to his performance in this position (Tr. 45).

In 1979, Complainant left GPC to work for Mrs. Shingler, who had provided him with a scholarship for college (Tr. 46). Shingler was interested in starting an alternative energy company, Pete-Mar, using wood chips for the generation of electricity (Tr. 46). When Complainant announced his intention to leave GPC, McKenzie attempted to convince Complainant that he was in the process of being promoted and he should not do so (Tr. 47). However, Complainant felt a sense of obligation to Shingler and left to work for her (Tr. 47). Complainant was not looking for a new position at this time and submitted no application or resume for it (Tr. 47). After approximately four months, Complainant became concerned about the feasibility of the tasks undertaken by Pete-Mar and, after discussion with Shingler, decided to leave the company (Tr. 50).

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[3]Complainant indicated this was commonly referred to as the Edwin I. Hatch Visitor Center at Georgia Power Company (Tr. 31).

[4]The other members of this committee were the President, Mr. Hatch, Executive VP, Joe Browder, two Senior VPs, Robert Scherer and Harold McKenzie, and the VP of Marketing, along with several others including Charlie Minors and Hal Wansley (Tr. 35, 38).

Although Complainant worked solely for the ad hoc committee, his official title remained Director of the Information Center (Tr. 628-9).

Prior to leaving Pete-Mar, Complainant was contacted by someone at GPC regarding a new industry organization, the Institute of Nuclear Power Operations (INPO) (Tr. 51). INPO was created to help utility companies "achieve the high standards of excellence in the operation of its nuclear power plants" (Tr. 52). All nuclear power companies were members of INPO and private insurance of such companies was dependent upon membership (Tr. 58). Complainant discussed INPO with George Head, the head of production at GPC, and Head encouraged Complainant to seek employment there (Tr. 52). Complainant then contacted GPC's representative to INPO, Dan Shannon, and was informed that ADM Eugene Wilkinson had been hired as the President of INPO (Tr. 53).[5] Shannon agreed to forward Complainant's resume to be considered for employment at INPO, and Complainant was called for an interview with ADM Wilkinson in April 1980 (Tr. 53, 60). At that time, ADM Wilkinson offered Complainant the position of Communications Manager, but indicated that he thought Complainant was qualified for a more technical position (Tr. 60). Complainant believes that his reputation at GPC was largely responsible for his ability to obtain a position with INPO (Tr. 55).

Complainant remained as Communications Manager until August 1980, when he became the assistant to ADM Wilkinson (Tr. 61). His duties in this new position included review of reports by division directors (Tr. 63). Complainant was also the Secretary of the corporation and was responsible for managing the Chief Executive Officer's Workshop, a two-day course presented to member utilities (Tr. 64). During Complainant's time at INPO, he developed a close business and social relationship with executives of the nuclear industry, including Mr. Miller, the President of GPC (Tr. 73). While employed by INPO, Complainant received excellent feedback regarding his performance from the Board of Directors and ADM Wilkinson (Tr. 66). Complainant testified that ADM Wilkinson told him that he had the potential to be a CEO in the industry. ADM Wilkinson told Complainant that after some time at INPO he should return to employment within the nuclear industry itself (Tr. 72).

In 1984, the industry formed the Nuclear Utility Management and Resources Committee (NUMARC) to interact with the Nuclear Regulatory Commission (NRC) and create industry recommendations and initiatives to address NRC concerns (Tr. 71). Miller became the Chairman of NUMARC and asked Complainant to head the Congressional Education Program in Washington, D.C. (Tr. 74). Complainant had not been searching for a new position at this time, but accepted the new position as an on-loan employee from INPO (Tr. 74, 78). The Congressional Education Committee was headed by Gene McGrath, of ConEd in New York (Tr. 75).

In March 1985, Complainant was contacted by Miller and asked to come to GPC as Miller's

[5]Complainant testified that ADM Wilkinson had been one of two individuals responsible for development of nuclear propulsion systems within the Navy. He was the first skipper of the USS Nautilus, the first nuclear powered vessel (Tr. 57).

assistant (Tr. 79).[6] Complainant continued to work on NUMARC business for a short period of time, until he could be replaced (Tr. 79). Complainant had not solicited Miller for this position, nor had he engaged in any job search activities prior to being offered this new position (Tr. 79). Complainant testified that Miller was highly regarded at GPC as a "very fair but a very tough, honorable man," and the fact that Miller chose Complainant as his assistant spoke well of Complainant's abilities (Tr. 95-6). Before retiring in 1987, Miller suggested to Complainant that GPC needed people in executive positions with "more breadth and depth who understand more about the company" and the Complainant should consider that in the future (Tr. 96). In addition, Complainant and Miller had a social relationship (Tr. 97). In the "assistant to" position, Complainant was not limited to merely assisting Miller in the nuclear operations area, but in all areas of GPC's work (Tr. 84). Complainant testified that he looked at this position as an opportunity to learn more about GPC and the Southern System (Tr. 91).[7] When Complainant returned to GPC, Miller issued a memo welcoming him back to work (Tr. 87). Complainant testified that this was common practice when an executive joined the company or took on a new position (Tr. 87).

Complainant's duties in this position included monitoring operation of coal and nuclear plants and visiting the sites of new construction of such plants (Tr. 92). He was also involved in setting goals and objectives for the company and in monitoring marketing efforts (Tr. 92). Complainant handled the mail in the President's office and testified that often resumes would be received there, but they were not reviewed at all and were sent to the Human Resources Department (Tr. 102).

This position allowed him to interact daily with the senior executives of GPC (Tr. 93). Complainant's job required that he attend the President's staff meeting which was held monthly to provide information to the "top people in the company" (Tr. 93). Complainant attended these meetings as part of his position, but was not responsible for presenting any information (Tr. 638). Complainant testified that these meetings are critical to one who is involved at an executive level in the operation of GPC (Tr. 94). Complainant indicated that to be reintegrated into GPC, it would be necessary for him to be involved in these monthly meetings, if they are still being held (Tr. 94).

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[6]Complainant testified that the "assistant to" position was a career-building position and offered several examples of individuals who had been in this position and moved on to high executive positions within GPC (Tr. 89). Miller, himself, had been an assistant to the Senior VP at Alabama Power and was promoted to Senior VP. Grady Baker had been assistant to the President at GPC and later became a Senior Executive VP. Pierce Head had also been an assistant to the President of GPC and became Senior VP of Human Resources (Tr. 89).

[7]In addition to GPC, subsidiaries of The Southern Company include Alabama Power Company, Gulf Power Company, Energia De Nuevo Leon, S.A. de C.V., Mississippi Power Company, Mobile Energy Services Holdings, Inc., Southern Communications Services, Inc., Southern Company Services, Inc., Southern Energy, Inc., Southern Electric Railroad Company, Southern Nuclear Operating Company and The Southern Development and Investment Group, Inc.

Complainant testified that in 1985, Southern Company owned GPC, Alabama Power, Mississippi Power, and Gulf Power (Tr. 91).

In 1986, Complainant was part of the Business Strategies Task Force, a joint venture between GPC and Alabama Power to determine the feasibility of combining their nuclear operations (Tr. 107). The task force consisted of three individuals from Alabama Power and Complainant, as representative of GPC (Tr. 107). In 1987, the proposal of the task force was approved by Southern Company and Complainant was asked to serve on Phase II, implementation, of the formation of the Southern Nuclear Operating Company (SONOPCO) (Tr. 108).

Complainant was contacted by Mr. Baker[8] concerning the possibility of being selected as the VP of Administrative Services for SONOPCO (Tr. 108). Baker "loaned" Complainant to nuclear operations to allow Complainant to obtain more line experience (Tr. 109). Complainant was informed that his chances for the vice presidency turned on his relationship with the Senior VP of Nuclear Operations, Mr. O'Reilly (Tr. 109). Baker commented in his performance appraisal of Complainant that he had done an "outstanding job in nuclear operations," and worked well with O'Reilly (Tr. 112). In an evaluation dated January 1988 for the 1987 year, it was noted that Complainant had "no known limit" as far as future growth potential within GPC (Tr. 119; CX-4). Complainant served as the Manager of Nuclear Support and was responsible for the administrative group and promulgating policy and procedure for the operation of GPC's two nuclear plants (Tr. 113). When O'Reilly resigned in February 1988, Complainant took on the additional responsibility of supervising the Manager of Nuclear Security and Manager of Financial Services (Tr. 114). Also in 1988, the Nuclear Operations group was moved to Birmingham, Alabama (Tr. 640).

In 1988, Complainant received a two level promotion from level 18 (9) to level 20 (10), to the position of General Manager of Nuclear Operations Contract Administration (NOCA) and Assistant to the Senior Vice President (Tr. 103, 120, 123). This was a new position with GPC and Complainant had input into the job description and creation of the position (Tr. 646-7). A.W. Dahlberg, President and CEO of GPC, issued a memo on December 27, 1988, announcing Complainant's appointment to this position (CX-8). The plans for creation of SONOPCO were proceeding and Complainant was asked by George Head, Senior VP of Power Generation, to coordinate the relationship between SONOPCO and GPC (Tr. 120). Complainant had a good working relationship with Head, and Head signed the April 27, 1989, letter found by the Secretary of Labor to be protected activity under the Act (CX-21; Tr. 126).[9] Hobby v. Georgia Power Company, 90-ERA-30 at 14, (Sec'y Aug. 4, 1995). However, following Complainant's termination his relationship with Head ceased and Complainant testified that he would not feel comfortable using Head as a reference (Tr. 132).

Complainant maintained the position of General Manger of NOCA until his termination (Tr. 125). His position was eliminated on February 2, 1990, effective April 2, 1990 (Tr. 134).

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[8]Baker replaced Miller as President sometime in 1987 (Tr. 108).

[9]In 1989, Complainant raised questions about who Pat McDonald, Executive VP of Nuclear and GPC's representative to NUMARC, reported to and whether practices of GPC might be in violation of the law (Tr. 258). Following this, Complainant's relationship to McDonald deteriorated (Tr. 258).

Complainant left employment with Respondent on February 23, 1990 (Tr. 139). Prior to his termination, Complainant supervised three employees: Bobbie Mintz, a senior secretary, and two financial administrators, Don Proctor and Gerald Johnson (Tr. 135-6). Complainant testified that these three individuals were informed by Counsel for Respondent that if they would not meet with Complainant prior to the hearing they would be represented by Counsel for Respondent. However, if they did meet and talk with Complainant they would have to obtain independent counsel (Tr. 138-9). Complainant was also moved to a smaller office and testified that he was humiliated by the furnishings and lack of space in this office. Specifically, Complainant related that he had to conduct a meeting with individuals from Oglethorpe Power in the cafeteria because there was no room to sit in his new office (Tr. 136-7). Complainant also lost access to the executive parking garage and had to return his employee badge (Tr. 143-4).[10] He testified that these actions were humiliating in that he was observed by those he used to supervise and had to explain to other employees why he was being moved (Tr. 146).

In late January 1990, Williams contacted Complainant to discuss a severance package offer (Tr. 147-8; RXR-8). Williams informed Complainant that GPC would provide outplacement services by the firm of Payne Lendman, to assist him in finding a new position (Tr. 148, 661; RXR-5). The package also included a five-year non-competition clause with GPC (Tr. 150). Complainant testified that a condition of acceptance of this offer was giving up all right to sue GPC (Tr. 148).[11] In addition, Complainant did not trust GPC and did not want to trust a company under the control of GPC to provide outplacement services (Tr. 149). Complainant did not think, at that time, that it would be difficult to find a new job as he had twenty years of experience in the industry (Tr. 149). Williams also discussed possible employment with SONOPCO with Complainant, but because of personal difficulties with the head of SONOPCO Complainant did not feel that would be a good place for him (Tr. 650).

Complainant testified that several executives at GPC had national contacts (Tr. 152-4). Specifically, Mr. Farley was, at the time of Complainant's termination, Chairman of INPO and was active in other industry-wide organizations; Pat McDonald had connections to both INPO and NUMARC; Mr. Harriston was also connected to INPO (Tr. 152-5). Complainant supervised two

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[10]I note here that the Secretary of Labor has ruled on Respondent's decision to move Complainant's office, parking privileges and remove his building access.

> Respondent's decisions adversely affected the privileges of Complainant's employment and were motivated at least in part by Complainant's protected activity. Complainant filed this ERA claim on February 6 and his office was moved thereafter, on February 9. His parking and access privileges were changed on February 19 (citations omitted). Hobby v. Georgia Power Company, 90-ERA-30 at 27, (Sec'y Aug. 4, 1995)

[11]It was Complainant's understanding that the outplacement services were subject to this restriction as well. However, Williams testified that this was not the case (Tr. 663). Complainant made no attempt to determine the availability of these services absent the signing of a release (Tr. 665).

secretaries while at INPO, Angie Hilley and Jackie Bylsma (Tr. 67). Complainant kept in touch with both of them after leaving work with INPO (Tr. 68). Bylsma moved to Washington, D.C. and worked for NUMARC (Tr. 68-9). Hilley (now Turbak) moved to the Chicago area and her husband was employed by Commonwealth Edison (Tr. 68). Complainant was contacted by both women in 1990 because they had heard that Complainant was fired by Respondent (Tr. 68). Complainant was embarrassed by this contact with his former employees and was surprised that they had heard of his termination (Tr. 69).

In December 1989, Complainant was informed that Oglethorpe Power had a an opening for which he was qualified. Complainant did not apply for this position as he was in negotiations with GPC and did not want to violate the non-competition clause. (Tr. 150). At that time Complainant did not believe he would have any difficulty in obtaining employment in the electrical power industry (Tr. 150). ADM Wilkinson warned Complainant that his status as a whistleblower would make it difficult to find employment in the nuclear industry (Tr. 151, 259). ADM Wilkinson noted that the nuclear industry was a "very close industry" and Complainant would not be able to obtain alternate employment (Tr. 260).

Immediately following his termination, Complainant found that the pursuance of his Section 210 claim was a "full-time job" (Tr. 158). Complainant testified that he was heavily involved in the preparation of his case for hearing and in the writing of briefs and that this level of involvement continued until January 1991 (Tr. 164). He attended not only his own deposition, but the depositions of other witnesses in this matter as well as assisting in the preparation of depositions and hearing testimony (Tr. 164-5). Complainant spent "a lot of time" responding to requests from his counsel and providing information to them (Tr. 682-3). Complainant was also working on a Section 2.206 Petition against Respondent at this time (Tr. 686).

Beginning in February 1990, Complainant contacted Oglethorpe Power Company to determine if the position previously offered to him was still available (Tr. 158).[12] That position, VP of Power Generation had been filled by Frank Wreath , and Complainant contacted both Dan Smith, Director of Power Generation, and Frank Wreath with Oglethorpe Power (Tr. 159-60). Smith indicated to Complainant that Oglethorpe would be interested in having Complainant was an employee (Tr. 161). Complainant was certain he would be hired by Oglethorpe during his discussions with them throughout 1990, but received no specific promise of employment (Tr. 162, 668). Prior to the first hearing in this matter, Wreath informed Complainant that after the hearing Oglethorpe would be "very, very interested" in him (Tr. 163). In January 1991, Complainant again contacted Oglethorpe and he was informed that they were still interested in him (Tr. 166). In mid-1991, the President of Oglethorpe resigned an was replaced by an acquaintance of Complainant's, Tom Kilgore (Tr. 167). Wreath informed Complainant that Kilgore had been informed of his interest in

[12]Complainant was familiar with the area in which Oglethorpe did business and knew many of the executives at the company (Tr. 159).

employment with Oglethorpe (Tr. 167). Complainant contacted a Board member of Oglethorpe[13] and was informed that there was no reason why Complainant could not work for Oglethorpe, but that any hiring decisions were up to Kilgore (Tr. 168-9).

Complainant arranged to meet Kilgore for breakfast and Kilgore informed him that he was in the process of getting settled into his new position as President and was assessing his employment needs (Tr. 170). Kilgore told Complainant that there may be problems with hiring Complainant because of Oglethorpe's relationship with Respondent. However, Kilgore said there may be a position for Complainant as a contract employee or as a consultant and Complainant expressed interest in this position (Tr. 170, 211). Kilgore left the meeting telling Complainant he would contact him in a few weeks (Tr. 170). Kilgore, Self, Smith, and Wreath informed Complainant that he may be needed in areas other than power generation, such as Human Resources, public affairs, or marketing (Tr. 215). Complainant expressed interest in accepting positions in all of these areas (Tr. 216-8, 220). Complainant testified that he had experience in all of these areas except for marketing, but was assured by Oglethorpe that his managerial skills were needed in marketing and any specifics could be learned on-the-job (Tr. 218).

Complainant did not hear anything from Oglethorpe for some time after this meeting, but responded to a newspaper advertisement for a position, Program Director of Power Production, with the company on August 13, 1991 (Tr. 172-3; CX-72).[14] Complainant was not offered this position as it was offered to another individual within Oglethorpe (Tr. 174). Complainant ascertained that his application had not even been forwarded from the human resources department to the hiring official for this position (Tr. 1042). Following this rejection Complainant met with Dave Self, Vice President of Power Production, on September 4, 1991 (Tr. 176). Complainant taped this conversation, as well as two others with individuals from Oglethorpe (Tr. 177, 208).[15] Self indicated that there "should

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[13]Complainant testified that he could not remember the gentleman's name, but that he was an acquaintance of Mrs. Shingler (Tr. 168).

[14]Prior to his termination by Respondent, Complainant had been offered the position of VP of power production at Oglethorpe, a position to which the program director reported (Tr. 1041).

[15]Transcripts of the taped conversations appear in CX-59.

In June 1997, Counsel for Respondent sent Smith a letter confirming an earlier conversation with him in which Smith indicated that the transcript was not inaccurate, but noted that he had never led Complainant to believe that he would have a position at Oglethorpe (RXR-18, 2). Smith further stated that Complainant would "be on his own in obtaining a position" at Oglethorpe (RXR-27, 2).

A similar letter from Counsel was sent to Self confirming that Self had never offered Complainant a position and was not aware that any such offer had been made (RXR-32). Self further clarified that he would not have recommended Complainant for a nuclear position at Plant Vogtle as Complainant did not have the technical experience for such a position (RXR-32A).

In a letter to Counsel for Respondent, Tom Kilgore stated that if Complainant had been the most qualified applicant for an open position, he saw no reason why he would not have been hired. However, Kilgore did not recall

not be a problem with [Complainant] going to work for Oglethorpe" and they discussed several positions for which Complainant would be qualified (Tr. 178, 214; CX-59). At another meeting Smith indicated that, "as long as [Complainant] wouldn't have to deal directly with Georgia Power or SONOPCO," there would be no problem with his working for Oglethorpe (Tr. 222). Complainant met with Wreath on September 18, 1991, and Wreath informed him that Kilgore and Wreath felt that the lawsuit needed to be resolved before Oglethorpe would consider hiring Complainant (Tr. 224-5; CX-59). Wreath added that, beside the lawsuit, there was no reason that Complainant could not be hired (Tr. 225-6).

Complainant was disturbed by this turn of events. Because the individuals at Oglethorpe were acquainted with Complainant and knew the history of his lawsuit, Complainant felt employment at Oglethorpe was his best chance at a position similar to the one he held with Respondent (Tr. 235). Complainant testified that he did not think his lawsuit would be a hindrance to employment with Oglethorpe as Smith had expressed concerns similar to those expressed by Complainant in his protected activity (Tr. 235).

In November 1991, Complainant was called by Smith to come to Oglethorpe to interview for one of five positions (Tr. 236). Complainant did go to Oglethorpe and filled out an application, but was unable to meet with Kilgore for an interview because Kilgore was "tied up" (Tr. 238). Complainant next spoke to Smith in December 1991, and was informed that no decisions would be made until after the holidays (Tr. 238). Complainant contacted Oglethorpe again in January and February 1992, but was told no action had been taken on his application (Tr. 238).

During the time that Complainant was discussing employment with Oglethorpe, he also contacted Eugene McGrath, of Consolidated Edison of New York, in January 1991 (Tr. 243, 246). McGrath was Complainant's supervisor at NUMARC until 1985, and had worked with him at INPO (Tr. 244-5). Complainant considered McGrath both a professional and personal acquaintance (Tr. 245-6). Complainant met McGrath in Washington, D.C. on January 24, 1991 (Tr. 248). McGrath informed Complainant that he knew of Complainant's termination by Respondent and informed Complainant that although he had no need for nuclear expertise at that time he did need someone with experience in performance standards and monitoring (Tr. 248). Complainant expressed interest in such a position (Tr. 249). Complainant contacted McGrath in March or April even though there had been no decision in his case yet (Tr. 250). McGrath did not return his numerous phone calls, so Complainant wrote to him requesting a response on April 25, 1991 (Tr. 250, 252; CX-58). In that letter, Complainant indicated that he sought a consultant rather than a permanent position (Tr. 1019; RXR-22, 143). Complainant then contacted ADM Wilkinson to call McGrath on his behalf. Upon inquiry from ADM Wilkinson, McGrath responded that " there are differences between New York and Atlanta" (Tr. 254). Complainant had no contact with McGrath after this (Tr. 254). Because of this incident Complainant felt he could not use McGrath, his former supervisor, as a reference in his

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expressing interest in hiring Complainant (RXR-33A).

employment search (Tr. 255). It was at this point that Complainant began to believe that ADM Wilkinson was correct in stating that Complainant would have difficulty finding a job (Tr. 260).

In early 1992, Complainant began to seek assistance in his job search (Tr. 239). An associate recommended he see Stuart Thompson (Tr. 239). Complainant met with Thompson, but was informed that Thompson generally worked for companies to search for employees. Thompson offered to improve Complainant's resume for $300-500, but Thompson told Complainant that because of his age and experience it would be difficult to obtain employment other than in the utility industry (Tr. 240-1). Complainant decided to find more broad-based assistance than Thompson could offer (Tr. 241).

Complainant next contacted the R.L. Stevens employment firm, which he had found through the telephone book and newspaper advertisements (Tr. 242). Complainant was interested in finding an upstanding firm and contacted the Better Business Bureau about R.L. Stevens and found no complaints (Tr. 242). Complainant agreed to pay $3,675.00 to R.L. Stevens in exchange for job search services (Tr. 282; CX-62).[16] R.L. Stevens sent Complainant to an all day seminar on job search tactics, which Complainant attended on May 1, 1992 (Tr. 285).[17] Complainant received and reviewed the information presented to him that day (Tr. 285-6; CX-64). Following the seminar, Complainant met with his consultant, David Griswold, to work out a marketing plan that he would follow to find a new position (Tr. 288-9; CX-66). Under the direction of Griswold, Complainant compiled a list of references and contacted senior executive search firms. His resume and cover letter were sent along with a note to each of these firms (Tr. 291; CX-68). R.L. Stevens sent out the resumes to the search firms and Complainant received confirmation from several firms that they had received his resume (Tr. 292).[18] Griswold also recommended that Complainant review classified advertisements, in Business Employment Weekly, The Wall Street Journal, Atlanta Constitution, and industry publications which Complainant did (Tr. 294). Complainant attempted to make contact with friends and acquaintances to obtain employment, but testified that his industry contacts had been limited by his protected activity (Tr. 295).

The staff at R.L. Stevens also assisted Complainant in his interview style by setting up mock videotaped interviews and assisted Complainant in creating a better resume (Tr. 296; CX-68). Complainant testified that R.L. Stevens would type and prepare the letters which would go out with

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[16]At the time of the hearing on remand, Complainant had paid R.L. Stevens only $2,450.00.

[17]Complainant testified that this seminar was attended by individuals at different stages of the career ladder. Not all the people in attendance were looking for executive position as Complainant was (Tr. 286).

[18]Complainant did not save copies of all of these correspondence (Tr. 292). Complainant testified that he did not receive copies of all letters sent out by R.L. Stevens on his behalf (Tr. 293).

Complainant testified that he received confirmation from Executive Recruiters and Heidrick & Struggles, both executive search firms.

his resume and applications, and he would review and sign the letters (Tr. 298).[19] Complainant thought that "R.L. Stevens worked very hard to find me a job" (Tr. 299). He was in contact with someone from R.L. Stevens at least once a week until he obtained full time work with a temporary agency (Tr. 1075-6). He prepared a list of individuals as contacts and received a computer print-out of energy companies which he discussed with Griswold (Tr. 1118-21). Complainant testified that he informed Griswold and others at R.L. Stevens that he had been terminated from GPC and that his termination may cause difficulties in trying to obtain other employment (Tr. 1083-4). Following these discussions Complainant contacted those individuals and corporations that they had identified as being appropriate (Tr. 1122). The staff from R.L. Stevens assisted Complainant in developing responses to questions regarding his termination and subsequent lawsuit (Tr. 1084).

Complainant began reviewing classified advertisements for positions as well. Throughout this period, Complainant attempted to stay current with the issues facing the nuclear industry by reading articles supplied to him by those still in the industry including ADM Wilkinson (Tr. 1005). Complainant's Exhibit CX-72 contains copies of advertisements and letters to potential employers (Tr. 262; CX-72).[20] Complainant testified that because of limited memory on his computer he did not maintain copies of all letters he sent out in search of alternative employment (Tr. 268). He received responses from some of the employers he applied to, but did not keep all of the rejection letters as he did not know it was necessary (Tr. 269).[21] Complainant

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[19]RXR-22 contains thirty-three letters sent by Complainant as contacts under the direction of R.L. Stevens (RXR-22, 179-229). Complainant testified on cross-examination that these were not all of the job contacts he had during this time. He indicated that he would not save copies of all letters as he often used a form cover letter and merely changed small portions (Tr. 1105). Complainant testified that he did not always receive copies of letters prepared by R.L. Stevens (Tr. 1107-8).

[20]CX-72 is numbered pages 145 through 276.

[21]Complainant's testimony and CX-72 reference applications to the following:

1. Paul, Hastings,Janofsky & Walker - Complainant applied to be administrator of this law firm law firm and Smith agreed to be a reference for that application in May 1991 (CX-72, 145). However, the firm decided to hire an individual with more pertinent experience (Tr. 264-6; CX-72, 153). In his resume to this firm, Complainant explained his litigation with GPC because the firm was involved tangentially through Smith (Tr. 1017);
2. Oglethorpe Power Corporation - Complainant replied to an advertisement for the position of program director, power production in August 1991 (CX-72, 154);
3. Resolution Trust Corporation - Complainant applied for the position of senior contracts specialist in October 1991 (CX-72, 164);
4. The Carter Center in Atlanta - An acquaintance wrote a letter of recommendation and introduction for Hobby to President Carter in March 1992 (Tr. 271-2; CX-72, 174). He obtained an interview with the Carter Center, but they had no positions open at that time for which he was qualified (Tr. 273);
5. Hayes Microcomputer Products - Complainant replied to an advertisement for the position of executive administrative assistant in the office of the President in June 1992 (Tr. 303; CX-72, 175);
6. John Sutton Associates Consultants, Inc. - Complainant replied to an advertisement for the director of operations in June 1992 (Tr. 333; CX-72, 176)

7. Complainant replied to an advertisement for VP and general manager for a medical device group in June 1992 (CX-72, 178);
8. In June 1992, Complainant sent an identical letter seeking a position similar to executive assistant to a president to the American Group Practice, Inc.; Chanko-Ward, Ltd.; Hyman, Mackenzie & Partners, Inc.; Richard Kove Associates, Inc.; The Mercer Group; PROSource, Inc.; Shaffer Consulting Group; Kimball Shaw Associates; Egon Zehnder International; Spencer Stuart & Associates; Russell Reynolds Associates; and three other prospective employers (CX-72, 180-1);
9. Complainant replied to an advertisement for the position of chief operating officer in June 1992 (CX-72, 182-3);
10. Montgomery Ventures, Ltd. - Complainant replied to an advertisement for a CEO in June 1992 (Tr. 333; CX-72, 184);
11. Complainant replied to an advertisement for the position of general manager for a manufacturer of technical products in June 1992 (CX-72, 187);
12. Russell Reynolds Associates, Inc. - Complainant sent his resume to this executive recruiting firm (CX-72, 189);
13. Heidrick & Struggles - Complainant sent his resume to this executive search firm (CX-72, 190);
14. Egan, Zehnder International - Complainant sent his resume to this search firm in June 1992 (CX-72, 191);
15. Complainant applied for the position of administrator in central Europe for an international law firm in June 1992 (CX-72, 192);
16. USO - Complainant applied for the position of director in July 1992 (Tr. 334; CX-72, 194);
17. Tennessee Valley Authority - Complainant contacted John Waters regarding a position with the Edison Project in July 1992 (Tr. 308-9; CX-72, 198). ADM Wilkinson also spoke to Mr. Waters of TVA on Complainant's behalf (Tr. 309);
18. Active Parenting Publishers - Complainant responded to an advertisement for the position of general manager in September 1992 (CX-72, 201-2);
19. Complainant responded to an advertisement in The Wall Street Journal for the position of aviation executive in September 1992 (CX-72, 203);
20. CI Music - Complainant responded to an advertisement for the position of general manager in September 1992 (CX-72, 205);
21. Ionpure Technologies - Complainant applied for the position of director of national field service and operations in September 1992 (CX-72, 207);
22. Fox-Morris Executive Search - September 1992 (CX-72, 211);
23. Fannie Mae - Complainant applied for the position of contracts administrator and manager of purchasing in October 1992 (Tr. 336; CX-72, 215, 219);
24. Oak Ridge Associated Universities - Complainant applied for the position of VP, division director of administrative services in October 1992 (Tr. 336; CX-72, 222);
25. Dyncorp - Complainant replied to an advertisement for the position of regional director in November 1992 (Tr. 337; CX-72, 226);
26. CEXEC, Inc. - Complainant applied for the position of project manager in November 1992 (Tr. 337; CX-72, 228);
27. MARTA Recruiting - Complainant applied for the position of manager of contracts in January 1993 (Tr. 337; CX-72, 233);
28. CHA of American Search Committee - Complainant replied to an advertisement for the position of president and CEO for Combined Health Appeal of America in February 1993 (Tr. 338; CX-72, 236);
29. Compuware - Complainant sent his resume in March 1993 (Tr. 338; CX-72, 240);
30. CARE - Complainant applied for the position of director of communications in March 1993 (Tr. 339; CX-72, 241);

testified that prior to applying for positions he would research the company so he could tailor his letter to the kind of work and the position advertised (Tr. 306). He would also attempt to make some sort of personal contact with someone with the company either through a contact of his or on his own (Tr. 311). Much of this action was as a result of the guidance Complainant receive and the assistance of the staff and counselors at R.L. Stevens (Tr. 308). Although Complainant's sought positions in other industries, he had not ruled out re-obtaining employment in the nuclear industry (Tr. 1113).

In January 1993, Complainant received a call from a management recruiter, Pete Georgiady, looking to fill the position of general manager of a small utility in Michigan. Georgiady indicated that Complainant had been recommended to him by Dan Smith. Complainant testified that Georgiady requested additional information which Complainant supplied and that Georgiady told him that the utility company was very interested in hiring Complainant (Tr. 301-2). Complainant contacted his references to determine if they knew anyone with this utility company and to request permission to use their name (Tr. 302). However, on February 24, 1993, Complainant received a letter from Georgiady saying he did not get the job (Tr. 303; CX-72, 232).

Complainant contacted James O'Conner, the CEO of Commonwealth Edison in Chicago (Tr. 273). O'Connor informed Complainant that, although Commonwealth Edison did not have a position for him, Complainant could use O'Connor as a reference (Tr. 274). Complainant contacted Lee Sillin, former CEO of Northeast Utilities, who worked with Complainant at INPO (Tr. 275). Sillin became chairman of a three-man committee created to coordinate the work of the "alphabet group," (Edison Electric Institute (EEI), Atomic Industrial Forum (AIF), American Nuclear Energy Council

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31. Lowerman-Haney, Inc. - Complainant responded to an advertisement for the position of VP of human resources in April 1993 (Tr. 339; CX-72, 244);
32. Boreham International - Complainant applied for the position of human resources director in May 1993 (Tr. 339; CX-72, 246);
33. Checkmate Electronics, Inc. - Complainant applied for the position of VP of operations in June 1993 (CX-72, 248);
34. The Society of the Plastics Industry, Inc. - Complainant applied for the position of executive director of the Plastics Pipe Institute in August 1993 (Tr. 339; CX-72, 249);
35. Complainant responded to an advertisement in the Atlanta Journal/Constitution for the position of director of investor relations and corporate communications in August 1993 (CX-72, 252);
36. American Institute of Architects - Complainant applied for the position of executive VP and testified that he researched this firm extensively and wrote a three (3) page letter as cover for his resume in November 1993 (Tr. 306-7; CX-72, 255-61);
37. United States Enrichment Corporation - Complainant applied for the position of regulatory assurance and policy director in January 1994 (Tr. 311; CX-72, 263). Complainant discussed this position with the Executive VP, George Rifakes. Rifakes indicated that he needed to fill the position as a liaison to the NRC as soon as possible. (Tr. 311-2) Complainant was not offered this position (Tr. 314);
38. Lawrence Livermore National Laboratory - Complainant applied for the position of business manager/senior manager (Tr. 311, 314; CX-72, 272-3);
39. Siemens Power Corp. - Complainant responded to an advertisement for the position of manager of customer service and contract administration in February 1994 (Tr. 340; CX-72, 274); AND
40. Alpha Enterprises - Complainant applied for the position of an executive in July 1992 (Tr. 340; CX-72, 276).

(ANEC), and INPO). Sillin had previously contacted Complainant to work with him on this committee (Tr. 276). When Complainant asked Sillin to be a reference for him, Sillin responded that he would have to contact Joe Farley and Pat McDonald before giving a reference (Tr. 278). Complainant was upset by this as he had worked closely with Sillin and yet he was unwilling to give him a reference without checking with Farley, for whom Complainant had never directly worked (Tr. 279).

Complainant also contacted the Georgia Employment Office to apply for unemployment compensation, but had missed a deadline to do so (Tr. 281). Complainant testified that it was humiliating to him to have to apply for unemployment. Complainant asked if the agency could refer him for any positions, but was informed that they did not deal with the kind of jobs for which Complainant was qualified (Tr. 281).

In September or October of 1992, Complainant began to work for a temporary agency (Tr. 318). He had been working with R.L. Stevens for some time and had not been successful in obtaining employment and needed to have some source of income (Tr. 317-8). The temporary agency[22] placed Complainant with Monumental Insurance Company in a data entry position at $8.00 per hour (Tr. 318-20). Complainant discussed possible permanent employment with Monumental and offered his resume to the Human Resources department (Tr. 320). Complainant was informed that he was too qualified for any of the positions Monumental had in Atlanta (Tr. 321-2). Complainant also pursued possible employment with the temporary agency itself (Tr. 322).

Complainant transferred to a larger temporary agency, Norrell, who placed him in a position with UPS in March 1993 (Tr. 323). During his first day with UPS, Complainant submitted his resume to the personnel office, seeking permanent employment (Tr. 323). Complainant worked for UPS for two weeks as a temporary employee and was reassigned to work for MCI for $7-8.00 per hour (Tr. 324). Again, Complainant attempted to obtain permanent employment with MCI, but was informed that he was over-qualified for the openings they had (Tr. 325). Following his work with MCI, Complainant was again assigned to work as a temporary employee with UPS in a filing position, which required Complainant to work in a hallway on his feet eight hours a day (Tr. 327). Complainant became a permanent employee of UPS in September 1993 after becoming proficient in the use of the computer software used at UPS (Tr. 330, 332).

Complainant continued to look for a position comparable to that he had held with Respondent, even after obtaining an entry level position with UPS (Tr. 331). Upon receipt of the Secretary of Labor's August 4, 1995, decision, Complainant sought reinstatement with Respondent (Tr. 341). In pursuit of this, Complainant sought enforcement of the Secretary's decision with the U.S. District Court for the Northern District of Georgia (Tr. 342). The court found that the Secretary's order was not enforceable as it was not a final order. The U.S. Appeals Court for the Eleventh Circuit affirmed the decision *per curiam*. Hobby v. Geogia Power Company, No. 1:96-cv-0180-ODE (N.D. Ga. April 18, 1996), *aff'd*, No. 96-8549 (11th Cir. May 6, 1997).

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[22]Complainant testified that the temporary agency was named either Temp Force or Talent Force (Tr. 318).

Complainant testified that he is still interested in being reinstated to employment with Respondent as a Level 26 (13) employee with all the rights and privileges accorded such employees (Tr. 343). Prior to his termination Complainant held a Level 20 (10) position (Tr. 345). He indicated that there would have to be "a clear message from the leadership of the company that I am reinstated, that everybody is to accept my reinstatement and I am to be supported and cooperated with to allow me to achieve the goals that are established for me by the company" (Tr. 88, 343). Complainant recognized that much had changed in the industry in the time since he last worked for Respondent, and indicated that it would be necessary for him to undergo retraining (Tr. 343). Complainant was also concerned with clearing his name in the various industry publications in which his termination was made public and with having his employment recorded cleared of any negative references (Tr. 347-8).

Complainant testified that in the time he worked for GPC he was unaware of anyone who obtained a level 19 (10) position or higher from submission of an outside resume (Tr. 104). In addition, Complainant was unaware of anyone outside the Southern Systems companies[23] who was brought in at a level 19 (10) or higher (Tr. 105). Complainant noticed that individuals would often move between different companies within the Southern System to gain broader experience (Tr. 106).

Complainant indicated that it was humiliating to have to admit to those he respected that he had been terminated. He testified that, to pay his bills, he had to borrow money from his mentor, ADM Wilkinson (Tr. 350). He first borrowed money from ADM Wilkinson to pay his substantial Federal Income Tax bill due to his liquidation of retirement funds in 1990 (Tr. 351). Complainant testified that he was proud of his success in life, as he did not come from a wealthy background and it was disheartening to be without a job and having to borrow money from friends and family (Tr. 352). Complainant was unable to care for his mother, when she was dying, in the manner in which he would have, had he been employed by GPC (Tr. 354). His self-esteem suffered due to his termination and subsequent inability to obtain comparable employment (Tr. 355). Complainant further testified that, because of his close relationship with the Shinglers, it was very embarrassing when he had to admit to her that he had been terminated by Respondent (Tr. 350). In January 1990, prior to his termination, Complainant contacted Miller to inform him that he had retained counsel. Miller indicated that this action reflected on him because he had brought Complainant into the company. Following this conversation, Complainant and Miller did not talk at all (Tr. 100). Complainant testified that losing Miller as a friend prohibited from using Miller as a resource in his job search (Tr. 101). Complainant suffered no physical ailments attributable to his termination, but experienced emotional distress (Tr. 1159-60). He discussed this distress with ADM Wilkinson, but did not seek professional help for this distress (Tr. 1162).

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[23] *See supra* note 7.

Complainant's exhibit, CX-132, contains Complainant's calculations of lost wages and benefits (Tr. 356; CX-132). Complainant testified to how each section was created and compiled (Tr. 358; CX-132-Q).[24]

Complainant seeks the following:

1. Reinstatement in a level 26 (13) position (Tr. 558).[25]

2. Back pay for lost base salary (Tr. 533-4, 543-561, 581-; CX-132-G; CX-81; CX-132-L; CX-76; CX-77; CX-78).[26]

3. Actual vacation time instead of the cash value of such time because of the stress that he has been under in the pursuit of this litigation (Tr. 360; CX-132-A).[27]

4. Job search expenses (Tr. 538-542; CX-132-B; CX-133; CX-84).[28]

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[24]The summary of damages in CX-132-Q is based on the tracking method of base salary calculation (Tr. 611-2).

[25]On cross-examination, Complainant testified that his preference is to return to work as opposed to front pay. However, he admitted that, depending on the specific terms, front pay may be acceptable (Tr. 625-6). Complainant was unaware as to what officer position an employee at level 26 (13) would occupy nor how many individuals at GPC occupied level 26 (13) positions (Tr. 1174).

[26]As of September 1, 1998, Complainant calculates his back pay at $1,114,363.22 plus interest (CX-132-G, 43). The parties have stipulated to the interest rate on any awards (Stipulation No. 8). To reach this amount Complainant calculated his average annual salary increase (7.920015%) from 1985 to 1989 and applied this increase for each year since Complainant was terminated (CX-132-G, 1). This amount was then decreased by his actual earnings since his termination (CX-132-G, 2).

In the alternative, Complainant testified that his back pay be determined by tracking the base salary of a comparable employee, William Paul Bowers (CX-132-L, 1). In 1990-1, Bowers served as the manager of marketing services for GPC. Prior to his termination, Complainant was the General Manager of NOCA (Tr. 586-7). Complainant testified that his strengths, weaknesses, and experience were similar to Bowers, although Bowers was in marketing and Complainant in power generation (Tr. 590-1). Complainant had never met Bowers (Tr. 1180). Complainant calculated his earnings and promotions by tracking the earning and promotions of Bowers (Tr. 594-8; CX-77; CX-78). Using this method, Complainant seeks $1,203,720.56 plus interest as of September 1, 1998 (CX-132-L, 45).

The parties stipulated to Complainant's base salary at termination and his earnings from other employers since that time (Stipulation Nos. 2, 3, & 7).

Salary increases become effective March 1 of each year (except 1990 when they became effective April 1) (Tr. 548).

[27]Complainant seeks 19 weeks of vacation (presuming the final decision is issued in 1998) (CX-132-A).

[28]Complainant seeks $3,605.31 (CX-132-B). Complainant testified that he did not make the final payment to R.L. Stevens because he did not have the money. However, R.L. Stevens had informed Complainant that he did not have to make this final payment because they had been unable to find him a position (Tr. 541). Complainant did not keep receipts for all his job search expenses, such as mileage and postage (Tr. 542).

5. Reimbursement for penalties paid on early withdrawal of IRA savings plus interest (Tr. 364; CX-132-C; CX-94).[29]

6. Damages resulting from liquidation of retirement and bond funds including tax penalties paid (Tr. 494-512; CX-132-D; CX-90; CX-91; CX-92; CX-93).[30]

7. Damages resulting from loss of car allowance (Tr. 513-519; CX-132-E).[31]

8. Loss of medical and life of insurance (Tr. 519-533; Tr. 535-8; CX-132-F; CX-96; CX-97; CX-78).[32]

9. Reimbursement of lost Productivity Improvement Plan (PIP) Bonuses (Tr. 562-7, 606; CX-132-H; CX-132-M).[33]

10. Reimbursement for lost Performance Pay Plan (PPP) bonuses (Tr. 568-73, 606-8; CX-132-I; CX-132-N).[34]

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[29]Complainant seeks $314.11 plus interest (CX-132-C, 41).

[30]Complainant liquidated 3,278 shares of Southern Company stock to pay living expenses following his termination (Tr. 501). Complainant asks that the money from the sale of these stocks be reinvested and capitalized and subject to stock splits as if it had not been liquidated and that he be reimbursed in stock rather than cash (Tr. 504). See infra notes 33, 34, 35, & 36. Complainant seeks $6,345.12 plus interest for tax penalties (CX-132-D)

[31]Complainant testified that, from 1986 on, GPC provided him with a mid-size car, gasoline, and maintenance (Tr. 514). Complainant seeks reimbursement for the prorated value of this perk from 1990 to 1993. In 1993, GPC discontinued this program and paid a one-time sum of $7,400.00 plus $2,957.00 (for taxes on the $7,400.00) to employees with company provided vehicles (Tr. 515; CX-83). Complainant seeks $23,721.27 as reimbursement for loss of this perk (CX-132-E, 1). *See* Stipulation No. 9.

[32]Under COBRA, Complainant maintained his health insurance with Respondent at cost. Following expiration of these benefits, Complainant obtained health insurance with Acordia Insurance Company until May 1993. Complainant was without health insurance from May 1993 until September 1993, when he became employed with UPS (Tr. 524-8). Prior to his termination, Respondent paid for an annual physical to its executives (Tr. 532). As of September 1, 1998, Complainant seeks $20,984.21 in medical/life insurance benefits, plus interest (CX-132-F, 44)

[33]Complainant testified that the PIP bonus was awarded to senior people at GPC. Prior to his termination Complainant had received this bonus (Tr. 563). The parties stipulated to the method of award and calculation for PIP awards (Stipulation No. 4). Because PIP awards are based in part on salary, Complainant's calculations are based on his base salary and level as indicated in CX-132-G and CX-132-L(Tr. 565). As of September 1, 1998, Complainant seeks $303,574.65 in PIP bonuses plus interest under the historical model and $369,370.70 under the tracking model (CX-132-H, 42; CX-132-M-42). See notes 30, 34, 35 & 36.

[34]The parties stipulated to the method of calculation for PPP awards and to the highest PPP awarded since Complainant's termination (expressed as a percentage of salary) (Stipulation No. 6). Because PPP awards are based in part on salary, Complainant's calculations are based on his base salary and level as indicated in CX-132-G and CX-132-L (CX-132-I, 1; Tr. 607). As of September 1, 1998, Complainant seeks $266,690.74 under the historical model and $267,995.12 under the tracking method plus interest (CX-132-I, 42; CX-132-N, 42). *See* notes 30, 33, 35 & 36.

11. Shares of Southern Company stock for lost stock grant benefits (Tr. 573-6, 608; CX-132-J; CX-132-O).[35]

12. Shares of Southern Company stock for lost Employee Stock Ownership Plan (ESOP) and Employee Savings Plan (ESP) retirement benefits (Tr. 576-80, 608-9; CX-132-K; CX-132-P).[36]

Complainant seeks reinstatement in a level 26 (13) position with GPC based on his calculated base salary (Tr. 558).[37]

B. **Testimony of Admiral Eugene Wilkinson** [38]

ADM Wilkinson testified via telephone at the hearing in Atlanta (Tr. 707). He testified that he made several loans to Complainant in the amount of $34,000.[39] Complainant has not repaid any of this amount (Tr. 708-9). ADM Wilkinson did not set an interest rate for these loans, nor does he expect any interest payments. However, Complainant has offered to pay interest on these loan amounts and has made ADM Wilkinson the beneficiary to a $25,000 insurance policy (Tr. 710).

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[35]The parties stipulated to the method of calculation for a stock grant (Stipulation No. 11). Complainant asks that these shares be purchased and and dividends collected and reinvested as if they had been purchased at the time of award, absent his termination (Tr. 575). Because the amount of stock grant is determined in part on salary, Complainant's calculations are based on his base salary and level as indicated in CX-132-G and CX-132-L. See notes 30, 33, 34 & 36.

[36]Under ESOP, GPC purchased Southern Company stock, equal to 0.8% of each employee's salary, and placed it in a tax deferred retirement account. The ESP program was similar, but allowed Complainant to contribute 6.0% of his salary into his ESP account (CX-132-K, 1). GPC matched 4.5% of this amount (Tr. 578). As with the stock grant, Complainant asks that these accounts be recreated and stock purchased retroactive to the date of award, absent termination (Tr. 577). To achieve this, Complainant agrees that 6% of his back base pay should be withheld to establish his ESP account (Tr. 580). Because the amounts placed in the ESOP and ESP accounts are based in part on salary, Complainant's calculations are based on his base salary and level as indicated in CX-132-G and CX-132-L. *See* notes 30, 33, 34, & 35.

[37]Respondent provided a list of minimum and maximum salaries for levels 20 through 24 (10 through 13) and Complainant's calculated base salary fell in the Level 26 (13) range (Tr. 559-60; CX-87).

[38]A Steven Wilkinson of GPC also testified in this matter. Hereinafter, any references to Admiral Wilkinson will be as "ADM Wilkinson" and references to Steven Wilkinson as, simply, "Wilkinson".

[39]The individual loans are as follows:

10-15-91	$10,000
12-30-91	$12,000
3-6-93	$4,000
9-21-93	$2,400
3-6-94	$2,800
4-10-94	$2,800

ADM Wilkinson was also deposed in this matter on June 4, 1996 (CX-44). He testified that he retired from the U.S. Navy in 1974 from the position of Deputy Chief of Naval Operations for Submarine Warfare (CX-44, 7). At the time of his deposition he was the President Emeritus of INPO and had served as the first President and CEO of INPO from January 1980 through March 1984 (CX-44, 8). He testified that his participation in INPO was in:

> An organization formed by the nuclear utility industry, after the accident at Three Mile Island, to enhance the level of safe operation of our country's nuclear plants. They did this both by setting standards for the proper operation of plants and by conducting inspections to see that those standards were met.
>
> I personally participated in the initial inspection of every plant that was then operating in the United States. As a part of that evaluation, I participated afterwards in the exit interviews with the CEOs of all the utilities. In addition to that, INPO conducts every year a two-day meeting with all the CEOs starting in 1980 . . . (CX-44, 9).

Further ADM Wilkinson has consulted with several utility companies (CX-44, 10).[40]

In his dealings with members of the nuclear community he found that the general attitude toward whistleblowers was negative. Whistleblowers were seen as trying to cover their own inadequacies with false reports (CX-44, 13). He testified that he could not recall a whistleblower being described in a positive light (CX-44, 13). ADM Wilkinson testified that if an employee made a report it would become known in the industry because of publication in industry periodicals and would be discussed by various executives (CX-44, 15). He stated, "There aren't any secrets in the industry" (CX-44, 27).

ADM Wilkinson opined that Complainant's chances of obtaining employment in the nuclear industry after filing a claim were "greatly diminished" (CX-44, 17). He indicated that when Complainant consulted him prior to making a report, ADM Wilkinson advised against such actions because it would "be injurious to his career in the nuclear utility industry" (CX-44, 18). However, after Complainant was terminated, ADM Wilkinson made several attempts on his behalf to assist him in obtaining employment. None of these efforts resulted in an offer for Complainant (CX-44, 20-4).

Regarding Complainant's potential, ADM Wilkinson opined:

> When Marvin first came to work for me in 1980, he was young, was smart and he was personable. He had excellent ability to communicate. . . . He was motivated. He had a good sense of responsibility. . . . I thought he had very good potential. That was in 1980.

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[40]He listed Philadelphia Electric Company, Public Service Electric and Gas New Jersey, GPC, Commonwealth Edison in Chicago, Arizona Public Service, Sacramento Municipal Utility District, Texas Electric and Washington Public Service (CX-44, 10).

> Over the years, as my assistant and then in his position in Numarc (sic) and then in his position for working for Georgia Power, he aged in experience. He made excellent contacts. He had high profile jobs. He had a good reputation. I thought the potential I had seen in 1980 was developing very well and by 1990, I though he had excellent potential to get high level positions in the nuclear utility industry (CX-44, 24-5).

However, following Complainant's protected activity, ADM Wilkinson opined that he had no chance of achieving a CEO position and an "infinitesimally small" chance of obtaining any high level executive position (CX-44, 25). Complainant's chances are hurt even more by the fact that he has been out of the industry for some time (CX-44, 25).

C. **Testimony of Henry Allen Franklin**

Franklin is the current President and CEO of Respondent and is on the Board of Directors of Southern Company Services (SCS), Southern Nuclear, Southern Energy, Inc., and Southern Communications (Tr. 371-2). Prior to holding this position, Franklin was President and CEO of SCS and prior to that had worked for Alabama Power (Tr. 373). Franklin testified that Southern Company was an electric utility holding company with subsidiaries including, Respondent, Alabama Power, SCS and others (Tr. 371-2). Mr. Dahlberg is the current President and CEO of Southern Company, but had been President of GPC until 1993 (Tr. 372-3). Franklin never worked directly with Complainant, and heard of him initially only in connection with the present litigation (Tr. 375-6).

Franklin testified that the Southern Management Council[41] developed uniform criteria and evaluation for top employees (Tr. 403-5; CX-99). Individuals with high potential were set up with developmental programs to identify weaknesses and allow those individuals to improve (Tr. 411). This program was generally informal, but some managers set up a more specific plan and more rigorous enforcement (Tr. 411). Some of this training could be done with other companies within the Southern System to fill a gap in an executives development, but Franklin testified that this could only be done at the request of the other company (Tr. 416). Franklin stated, "This was a Georgia Power Company process and what we were trying to do here is promote our people into some of these, or at least consider promoting to these other companies some of our better people where we could not...give them the experience that we wanted them to have" (Tr. 431). GPC also offers training through Harvard University and has provided for executive employees to obtain their MBA

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[41]The Management Council was made up of CEOs of the subsidiaries of Southern System. At the time CX-99 was generated the members were:

Mr. Addison - CEO of Southern Company
Joseph Farley - head of Nuclear Operations
Elmer Harris - CEO of Alabama Power
A.W. Dahlberg - CEO of Georgia Power
Doug McCrary - CEO of Gulf Power
Paul DiNicola - CEO of Mississippi Power
Joe Lett - CEO of Savannah Power
Franklin - CEO of SCS

at Georgia State University (Tr. 421). Most management positions within the Southern Company are filled with individuals already working for one of Southern Company's subsidiaries (Tr. 406-7). In fact at GPC, Franklin testified that all twenty-five individuals at the VP level or higher, were hired from within the Southern System (Tr. 408).

In determining whether an individual is promoted at GPC or Southern System, several characteristics are considered (Tr. 383). Franklin testified that these characteristics include, integrity, intelligence, ability to interact with others, hard work, and personal responsibility for results (Tr. 383). Franklin indicated that he believed Complainant had been an "assistant to" at the time of his termination (Tr. 394).[42] An "assistant to" position was generally held for one to three years as a skills building experience (Tr. 451).

GPC has several mechanisms for making company-wide announcements to employees. Some announcements are merely passed down through the chain of command. Others are published in one of GPC's periodicals, including "The Citizen" or the Southern Company periodical, "Southern Highlights" (Tr. 399-400). On occasion some memos are distributed to all employees individually, particularly those announcements related to benefits (Tr. 400).

Franklin testified that GPC maintains a separate corporate identity from Southern Company (Tr. 448). GPC has its own Board of Directors and has no control over the management or operations of other subsidiaries (Tr. 448-9). GPC makes its own decision regarding the hiring and firing of its employees (Tr. 449). Several years ago, all of the human resources staff from all subsidiaries of Southern Company were consolidated into SCS (Tr. 450).

Franklin testified that on the advice of counsel he had made the decision not to reinstate Complainant after the Secretary's August 1995 decision (Tr. 378). Franklin did not contact Complainant prior to making this decision, but indicated that the time which had elapsed would make it "very, very difficult" to re-integrate him into the workplace (Tr. 378-9).[43] Franklin indicated that the situation among management at GPC was very competitive because of downsizing. Because of this atmosphere, it would be difficult for anyone who had been out of the industry to perform and gain credibility with their peers (Tr. 387). In addition, Franklin testified that it would be bad for "the morale of the people who had been there all of that time working hard to qualify for those positions" (Tr. 386). In response to Judge Barnett's question, Franklin opined that it would not be in anyone's best interest to reinstate Complainant (Tr. 386).

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[42]Franklin had held this position with both Alabama Power and SCS. He named the following, who had held the position of "assistant to" and now held higher positions within Southern Company:

Dwight Evans - President and CEO of Mississippi Power

Charles Whitney - Vice President of SEI in Europe (a Southern Company subsidiary with foreign operations)

[43]Franklin testified that he discussed the difficulty of re-integration with others in management, but could not remember the specifics of the discussion (Tr. 380).

Franklin testified that, because of downsizing, it would be difficult to determine where Complainant would now be working had he not been terminated (Tr. 392). Franklin admitted that "a goodly number" of those in management who were downsized were voluntary or early retirees (Tr. 393).

Franklin indicated that, if ordered to reinstate Complainant, he would do "everything I humanly can do" to make the reinstatement successful (Tr. 442). He suggested that discussions with senior management would be helpful to this process, but that a memo to employees probably would not be of assistance (Tr. 443). Franklin testified that he no longer holds monthly staff meetings for VPs, but they do meet approximately every three to four months (Tr. 437).

In anticipation of Complainant's argument for calculation of back pay based on a comparable employee, Franklin testified that Paul Bowers was the Senior VP of Marketing at GPC (Tr. 459). Bowers started with the marketing department with Gulf Power and Franklin thought that all his education and experience was in the area of marketing (Tr. 460; CX-76). Bowers was recognized early in his career as having high potential with Gulf Power (Tr. 460). GPC recognized this potential and hired Bowers as manager of marketing and sales (Tr. 461, 467). Franklin testified that Bowers advanced in his career at an "very unusual pace" and indicated that he may be the youngest VP at GPC (Tr. 462).

D. **Testimony of Dwight H. Evans**

Evans is the President and CEO of Mississippi Power Company (Tr. 827). Prior to holding this position, Evans served as VP of Governmental Affairs for Southern Company Services from 1987-88, as Senior VP of GPC from 1988-89, and as Executive VP of GPC from 1989-95 (Tr. 827-8). Evans had been an "assistant to" Mr. Scherer, the Chairman and CEO of GPC and to George Edwards, Executive VP of External Affairs and to Jack Widener, Senior VP (Tr. 848-9). Complainant came under Evans supervision on January 1, 1990, but Evans had very little contact with him (Tr. 828, 837, 846). Evans testified that Complainant's future with the Respondent was discussed at a Management Council Meeting in November or December of 1989, as Complainant's position was being eliminated (Tr. 830).[44] Evans indicated that there were other positions for which Complainant was qualified, but, to his knowledge, Complainant did not attempt to obtain these positions (Tr. 832). It was "routine" to assist individuals being downsized to find other positions (Tr. 854). Evans told Williams to be "helpful and considerate" in finding Complainant alternate work within GPC (Tr. 853).

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[44]The Secretary of Labor stated:

> The council members in effect decided to terminate Complainant's employment during the November 7 meeting. Baker ultimately conceded that they decided to eliminate the position at that time. . . . The November 7 decision was made irrespective of whether Complainant's position had a function. . . . Various witnesses who attended the November 7 meeting testified that the focus of the meeting was "people," not any particular job. Hobby v. Georgia Power Company, 90-ERA-30 at 18, (Sec'y Aug. 4, 1995)

Evans testified that he had less respect for Complainant since Complainant instituted this lawsuit (Tr. 843). Evans did believe that he could again work with Complainant if Complainant were reinstated (Tr. 851). However, he did not believe this was the best result because of "dramatic changes in our company ... to be a lower cost producer" (Tr. 853).

Evans testified that Paul Bowers is Senior VP of Marketing for Respondent (Tr. 833). Bowers joined GPC at a very competitive time and "did quite well in leading" efforts to stay "aggressive with costs and prices" (Tr. 834). Evans indicated that Bowers' advancement within GPC was unusual (Tr. 835).

E. **Testimony of Howard Winkler**

Winkler began employment with GPC in 1976 in the Corporate Communications Department and after holding several other positions moved to Southern Company Services as a staffing manager in 1995, and remains in that position (Tr. 1713). His duties in the position include analyzing the workforce of the Southern System and providing recruitment and planning support to the companies (Tr. 1783-4).

Winkler became involved in downsizing at GPC in 1991 when he took the position of Human Resources Research Coordinator (Tr. 1713). He testified that downsizing became necessary as a cost reduction mechanism due to increased competition (Tr. 1714). To the best of his knowledge, Complainant was the only employee at a level 19 (10) or higher who was involuntarily separated as a result of downsizing efforts (Tr. 1790).

Winkler submitted an affidavit in this matter, but, at the hearing, noted that it contained several errors (Tr. 1716; RXR-2). These errors were corrected by interrogatory response (RXR-3). Respondent undertook downsizing in several ways (Tr. 1738). Employees who had reached the age of 55 with at least ten years of service were offered early retirement. Individual departments undertook evaluations of their operations and employees and offered severance benefits and outplacement to those who were downsized (Tr. 1738). Other employees were offered positions elsewhere in the company at a lower level (Tr. 1741). From January 1, 1989 to September 1, 1995, GPC reduced by 3,645 its number of total employees (RXR-2, 2).[45] In this same time period GPC went from 91 employees at a Level 18 (9) or above to 69 such employees (RXR-3, 2). The majority of these reductions occurred from 1994 to 1996 (RXR-3, 2).

Winkler opined that:

> It is extremely likely that [Complainant] would have been — that his position would have gone away in any event in the downsizing that took place throughout the late 80's and through the 90's, and that based on the evaluations of Mr. Hobby that he

[45]Most of the 1,171 positions lost in 1989 were due to the completion of the Plant Vogtle construction (Tr. 1803).

himself would not have remained at that level — at the level he was in before he left the company (Tr. 1743-4).

He based this opinion on Complainant's skill, evaluations, and position (Tr. 1744).[46] Winkler further noted that Complainant would have been considered for another position with GPC, but at a lower level (Tr. 1744). Complainant's experience was in the nuclear area and GPC no longer employs nuclear related employees, having transferred them to SONOPCO, another subsidiary of Southern Company (RXR-2, 4-5). It is impossible for Winkler to determine what position Complainant would have held had he not been terminated in 1990 and whether such a position would have been down-sized (Tr. 1813).

Winkler testified that the Southern System consolidated its human resources management in 1995. This consolidation did not affect the individual corporations ability to hire and fire employees (Tr. 1746-7). Reference checking, college recruiting, and other administrative functions are performed centrally as a cost reduction method (Tr. 1747). Each subsidiary establishes its own hiring criteria (Tr. 1749).[47] On cross-examination, Winkler acknowledged that it was the normal practice to consider all level 17 (9) and above employees for any job opening throughout the Southern System (Tr. 1805; CX-126).

F. Deposition Testimony of Shearer G. Folsom

Folsom consulted Winkler on the methodology of production of the chart in Winkler's responses (Tr. 2552; RXR-3). The methodology employed excluded employees who transferred into level 18 (9) or higher positions at GPC, GPC employees who transferred to other subsidiaries, GPC employees at level 17 (9) or below who were promoted into a level 18 (9) or higher position, GPC employees at level 17 (9) or below who had job changes or title changes into a new 18 (9) position, vacant positions at GPC, and all newly created level 18 (9) positions (Tr. 2554-6).[48]

G. Testimony of Fred Williams (& Deposition Testimony)

Williams began employment with Southern Company in 1969 in the system planning area with transmission generation planning. In 1982, he moved to GPC as general manager for power markets,

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[46]Winkler testified that Respondent had experienced some difficulty in obtaining candid evaluations in the past. During downsizing, new evaluation criteria was put in place to provide more reliable evaluations (Tr. 1759-60). He further indicated that he was unaware when signing his affidavit that the evaluation upon which he relied had been found to be a discriminatory act (Tr. 1761). Hobby v. Georgia Power Company, 90-ERA-30 at 18-21, (Sec'y Aug. 4, 1995)

[47]Winkler illustrated this point with the following examples: Gulf Power does not hire smokers; Mississippi Power will not hire any relative of any officer or any current employee's spouse; and Alabama Power uses preemployment tests (Tr. 1749-50).

[48]Folsom also admitted that many employees were omitted due to some "merge process" (Tr. 2556 *et. seq.*). Complainant's exhibit 168 contains candidate profiles for employees level 18 (9) and higher who were not included in Folsom's chart (CX-168A - Stipulation).

but transferred back to Southern Company in 1995 as Senior VP of wholesale energy. He held that position until October 1997, when he returned to GPC as Senior VP (Tr. 1859-60).

Williams was Complainant's direct supervisor for a two-month period prior to his removal (Tr. 1899). He testified that, in late 1989, it was determined that NOCA's functions were duplicative and the group was eliminated, along with Complainant's position (Tr. 2262). The three employees under Complainant in NOCA were absorbed into the bulk power contracts administration section under Bill Smith (Tr. 2263).[49] Smith and Myer assumed the duties formerly handled by Complainant (Tr. 2348). Williams informed Complainant of the decision to eliminate NOCA and asked Complainant if he would like him to inquire with Southern Nuclear or the fossil hydro group about a position. Williams testified that Complainant indicated that he was not interested in joining these groups or in taking a position at a lower level (Tr. 2264-5; 2267). Williams also indicated that there were no positions available in his section either at Complainant's level or at a lower level (Tr. 2265).[50]

Williams then discussed the separation package offered by GPC with Complainant (Tr. 2267).[51] A requirement of the separation package was the employee signing a release and settlement (Tr. 2268). Complainant was also offered outplacement services with Payne-Lendman, but he indicated that he was not interested (Tr. 2269; RXR-5). Williams testified that there was no condition placed on the acceptance of the outplacement services (Tr. 2270).

Following Complainant's termination, Williams did not receive any employment inquiries from other companies, but had he received such an inquiry, he was authorized to release only that Complainant had worked for the company and verify his salary level (Tr. 2271). Williams testified that Complainant did not request a reference letter from him, but that he would have provided one (Tr. 2272). Williams was responsible for moving Complainant to a new office and removing his parking privileges and executive badge (Tr. 2287).

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[49]Smith was a level 17 (9) employee at this time and retained the same job title and level when the NOCA employees were absorbed into the section he lead (Tr. 2263).

[50]It is noted here that the Secretary of Labor ruled on Williams' offers of other positions.

> Williams' testimony that he offered Complainant other positions in lieu of termination does not convince me that Respondent had not already decided to remove Complainant from the "pipeline" for retaliatory reasons. The *offers were hollow and unauthorized*. . . . After all, there was "no place in Georgia Power" for Complainant. In any event the alleged *offers were not for comparable employment, to which Complainant is now entitled as a remedy for Respondent's unlawful retaliation* (emphasis added; citations omitted). Hobby v. Georgia Power Company, 90-ERA-30 at 26, (Sec'y Aug. 4, 1995)

[51]The standard severance package included four weeks' pay, followed by one week pay for every year service and six months of insurance benefits (Tr. 2361). Complainant was also offered full employment to August 1990, four years insurance and 25% of salary for four years plus incentives (Tr. 2364).

Williams testified to the changing nature of the electric utility industry (Tr. 1890). Similar to the telecommunication industry, electric utilities have become deregulated and are subject to more serious competition than in the past (Tr. 1890). To remain competitive GPC has had to cut costs (Tr. 1893). Williams opined that an individual who had been out of the industry for seven years would have difficulty re-assimilating into the work at GPC (Tr. 1895). Specifically, based on his knowledge of Complainant's situation, he did not believe Complainant could effectively carry out the duties of a high level position at GPC due to his long absence, nor did he believe Complainant could be effectively re-educated to assume these duties (Tr. 1896-7).

Williams testified that he would find it difficult to work with Complainant, should he be reinstated (Tr. 1912-13).[52] GPC offered employees training opportunities through Southern Company College, visitations to cost effective outfits, and hired consultants to educate employees on the changing environment in the industry (Tr. 1920).

H. **Testimony of Dr. Diane Davenport**

Dr. Davenport is presently employed by Cox Enterprises, Inc., but previously worked for the Southern System as Director of Human Resources, East (Tr. 1931). She began work with GPC in 1985 as a training representative and remained with the Southern System until 1997 (Tr. 1931-2). Among other duties, Dr. Davenport was involved in the creation and implementation of a leadership development process for the entire Southern System (Tr. 1950).[53] The development process involved only employees at a level 19 (10) or above who held vice presidential positions or above (Tr. 1960). Dr. Davenport testified that, "There was a fair amount of resistance to this whole idea of developing talent for the Southern Company because the CEOs of each one of those subsidiaries were accustomed to choosing their own people, selecting their own teams, working where they had the most knowledge, and there was resistance to changing that process" (Tr. 1962). Dr. Davenport testified that individuals may be placed in developmental positions to test his/her leadership ability and provide him/her with knowledge of other areas of the business (Tr. 1966).

Dr. Davenport was asked to review all positions level 18 (9) and above which had been vacant from 1990 forward to determine if Complainant was qualified for these positions and if so qualified whether he would have been selected to fill the position (Tr. 1933). To create this review, Dr. Davenport reviewed tables created by Dennis Eubanks (Tr. 1934; RXR-4).[54] Dr. Davenport reviewed

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[52]At his deposition, Williams testified that he could work with Complainant, but upon further reflection determined that because there was "a lot gone under the bridge" he would be uncomfortable with such an arrangement (Tr. 1912-13).

[53]The group formed was the Southern management council, but this process was not implemented prior to Complainant's termination (Tr. 1951).

[54]On cross-examination, Dr. Davenport admitted that some positions at level 18 (9) or above were not included in her review because they were excluded from the search (Tr. 2018 *et.seq.*).

Complainant's qualifications and considered each position available with GPC in light of these qualifications (Tr. 1935-6).[55]

Dr. Davenport concluded that Complainant might have been qualified for two positions: 1) VP of procurement and materials; and 2) director of corporate communication (Tr. 1936). However, these positions were filled with individuals who were better qualified than Complainant (Tr. 1937). On cross-examination, Dr. Davenport testified that GPC may hire an individual for a position who, on paper, seems less qualified, but in developing its leadership base, placement is best for the company as a whole (Tr. 1982).[56]

Dr. Davenport testified that it was unusual for a high level GPC employee to hold four different "assistant to" positions during his career, as Complainant had done (Tr. 1937). She felt such a career progression would be a limitation to further promotions within Southern Company (Tr. 1938). Further, Dr. Davenport found that there were no positions at GPC which were comparable to Complainant's position prior to termination as of January 1997 (Tr. 1938).[57]

Dr. Davenport testified that it was the policy of Respondent that, in response to a request from other employers, managers should confirm the employment, title and years of employment only of a former employee (Tr. 1941).

I. Testimony of L. Dennis Eubanks

Eubanks joined the Southern System in 1969 in the procurement organization of GPC. In 1976 he moved to Southern Company Services to work for the vice president of human resources and in 1990 became manager of leadership development and planning (Tr. 2074-5).

In late 1996, Eubanks compiled a list of positions Level 19 (10) and above for which there was a system wide search (Tr. 2076; RXR-4; RXR-4A). He further oversaw the preparation of a second compilation of positions below level 19 (10), available from mid-1990 to the end of 1990 (Tr. 2083; RXR-20).

J. Testimony of Steven Wilkinson

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[55]Dr. Davenport obtained Complainant's qualifications by a review of the job description from his position as general manager of NOCA and his testimony from a previous proceeding before the NRC (Tr. 1935). She did not review his performance reviews or talk to any of Complainant's former supervisors (Tr. 1948). Dr. Davenport testified that she was unaware of Complainant's duties at INPO and NUMARC or his duties or relationship with Miller, the former CEO of GPC (Tr. 1997-8).

[56]Dr. Davenport further stated that this was not always done and was used only for individuals who were identified as having high leadership potential (Tr. 1982-3).

[57]The opinion was based on the fact that all nuclear activities were switched from GPC to SONOPCO after Complainant's termination (Tr. 1939).

Wilkinson joined the Southern System in 1980 in the human resources department of Mississippi Power. He continued there until 1989 when he was transferred to Southern Company Services and has continued in the position of compensation manager for Southern Company since that time (Tr. 2124). In this position, Wilkinson assisted the subsidiary management in developing policy in the compensation and employee benefits area (Tr. 2125).[58]

Wilkinson provided Dr. Staller with some of the assumptions necessary to complete his report, RXR-10 (Tr. 2125).[59] Wilkinson explained that the productivity improvement plan (PIP) is a:

> long-term incentive plan that is maintained for executives in the company, primarily grade 10 and above. The incentive plan pays out in cash annually. It is — the range of award opportunities is based upon your grade level assignment, and the award payouts can range from, of corse, no payout, depending on the financial performance of the company, up to a level above target or two times target awards (Tr. 2126).

Employees below level 20 (10) do not qualify for this award (Tr. 2126). Wilkinson provided Dr. Staller with information regarding what awards Complainant may have received if he had been a level 20 (10) from 1990 to 1997 (Tr. 2127).

Wilkinson explained that performance pay plan is a:

> short-term incentive plan or an annual incentive plan; it's a bonus plan that's provided for all employees. You — the funding for the plan is based upon the company's performance for that period of time, typically the calendar year . . . . A pool of dollars is generated based upon the company's performance, and that is distributed to each organization and managers can then allocate this pool of dollars to awards for their employees. It is derived based upon the salary levels or aggregate salary levels in an organization, so a funding percentage is established, and then that generates a pool of dollars which is finite and cannot be exceeded (Tr. 2128).

He provided Dr. Staller with information on the average funding level for GPC from 1990 to 1997 for this program, taking into consideration Complainant's level 20 (10) position (Tr. 2128). In addition Wilkinson provided Dr. Staller with information regarding budget funding percentages which

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[58]Both parties agreed that Wilkinson could be used to generate real figures once a decision is rendered by the presiding judges, in the case that the presiding judge follows neither party's assumptions for calculations of damages (Tr. 2175).

[59]These numbers are supplemented in RXR-31, which includes calculations for PIP and PPP awards based on first quarter earnings for 1997 (Tr. 2172-3; RXR-31).

indicate funds provided to organizations to be distributed to employees for merit salary increases (Tr. 2130).

Wilkinson testified that Complainant could have avoided the liquidation of his retirement accounts as indicated in CX-132, C &D (Tr. 2131-2). He further indicates that Complainant double-counted interest damages in CX-132, D, stating:

> In the award for back pay damages, what is shown in the calculations in the retirement fund and liquidation and the restoration of the retirement fund liquidation, there's double counting in that the contributions to the retirement fund in restoring the interest accumulated or the growth in that interest on that, those contributions that could be made from back pay, since the interest is supplied to both back pay and the retirement fund liquidation, there's really double counting of that interest on that money (Tr. 2132-3).

Wilkinson testified that employees at GPC share in the cost of premiums for both health and life insurance (Tr. 2135-6).

Wilkinson opined that Complainant's calculations based on the historical method of calculating backpay were unrealistic (Tr. 2137; CX-132, G, H, I, J, K). He testified that most employees who reach a level 20 (10) position, go no further than that, because there are very few positions available above that level (Tr. 2137). Further, Wilkinson testified that it is not an automatic progression for an employee to receive a level increase merely upon reaching the maximum salary level for his/her current level (Tr. 2137-8).[60] He also testified that it was unrealistic of Complainant to assume that he would receive the highest PPP award for the relevant period (Tr. 2138). He questioned Complainant's assumption of funding percentages for both PPP and PIP for the years 1997 to 1999 (Tr. 2138-9).

Wilkinson opined that it was not reasonable to use the tracking method to determine Complainant's future earnings as Complainant and Paul Bowers were on two different career paths: Bowers in marketing and Complainant in nuclear compliance (Tr. 2142; CX-132, L, M, N, O, P). Again, Wilkinson pointed out that a promotion was not automatic upon achieving the maximum salary in one's present level (Tr. 2144).

Wilkinson explained that GPC's stock option plan:

> Gives employees who participate in it a right to purchase shares of Southern Company's stock at a fixed price over a ten-year period, and the calculation is basically a grant multiple that is used as a percentage of base salary to arrive at a number of shares that an individual could purchase over that period of time. Then there's in addition a vesting schedule that is time-based, the longer you stay with the

[60]The minimum in a salary range is 75% of the midpoint and the maximum is 120% of the midpoint (Tr. 2156).

company, the more of those shares you cold actually purchase, if you wished to (Tr. 2139-40).

He opined based on the stock grant program that, had Complainant invested at the most opportune time, he would have realized only $4,000 in profits from the stock grant (Tr. 2140-1).

Wilkinson testified that had Complainant used simple rather than daily compounded interest his total interest calculation would be reduced by approximately $25,000 or $30,000 (Tr. 2147).

K. **Deposition Testimony of William J. Smith**

Smith began his employment with Southern System approximately 26 years ago in the data center of Southern Company Services. After seven years he transferred to GPC and served in various positions until two years ago when he transferred back to Southern Company Services (Tr. 2490-1). In 1989, Smith was employed as manager of bulk power marketing services for Respondent (Tr. 2491).

Following the elimination of NOCA, the three employees, Johnson, Proctor and Mintz, under Complainant's supervision were transferred to Smith's section (Tr. 2494). Smith's responsibilities, contact administration, negotiation and interfacing with plant co-owners and other Southern Company sections, did not change following this transfer nor did his compensation level 17 (9) (Tr. 2496-7). Some of NOCA's responsibilities were absorbed by Southern Nuclear in Birmingham (Tr. 2504). Smith testified that there were no available positions in levels 17 through 20 (9 through 10) in the bulk power organization (Tr. 2500).

L. **Testimony of James J. Cimino**

Cimino is Vice President of Executive Search Limited[61] and was hired by Respondent to determine "whether or not Mr. Hobby had expended reasonably diligent effort in pursuing other employment after leaving Georgia Power" and to evaluate Complainant's potential for attaining a CEO position (Tr. 880, 883).[62] He prepared a "Study of Employment Opportunities, March, 1990 Through December of 1993" dated September 30, 1996 (Tr. 881; RXR-26).[63] Cimino reviewed Complainant's resume and credentials and responses to employment advertisements as provided by GPC.[64] He also screened advertisements from several publications (Tr. 881).[65] Cimino testified that

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[61]Cimino's resume appears at RXR-11.

[62]Cimino used three sources in evaluating Complainant's CEO potential: 1) a Dun & Bradstreet data disk; 2) biographical information from Lexis/Nexis; and 3) information from counsel for Respondent about the CEO of Southern Company (Tr. 884).

[63]Cimino testified that he charged about $65,000.00 for the preparation of this and his second report (Tr. 920).

[64]"According to information provided by [Respondent's counsel], Marvin B. Hobby was released from employment by Georgia Power Company on February 23, 1990. Mr. Hobby held several temporary assignment beginning in 1992 and is currently permanently employed with United Parcel Service as an "Administrative Assistant'"

he and his staff reviewed these publications with an eye toward positions which were consistent with Complainant's background and geographically located in the Southeast United States (Tr. 882, 890).[66] The positions found were split into three categories:

1. Category A advertisements were for those positions "consistent enough with Mr. Hobby's background that had he responded the company would have considered him for the position" (Tr. 882);

2. Category B advertisements were for those positions "because of their size, their nature, their markets, their products Mr. Hobby would be prudent in sending a resume to that company recognizing that that particular position did not match his background but he wanted to identify to that company that his talents were available to be hired" (Tr. 883); and

3. Category C advertisements were for recruiting services (Tr. 883).

Cimino opined that the efforts expended by Complainant did not "measure up in the smallest degree to what we consider to be reasonably diligent effort" and had Complainant expended such effort he could have obtained employment within twelve months of his termination (Tr. 885).[67] Cimino further opined that Complainant "had not developed the credentials nor was he on a career path that could have elevated him at any time in the future to that of CEO responsibility" (Tr. 885).[68] He testified that the positions available averaged approximately $75,000 per year in salary without

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(RXR-26, 1).

[65]The Wall Street Journal, The Atlanta Journal-Constitution, Nuclear News, and Chemical Engineering.

[66]From February 1990 through December 1993, Cimino uncovered 1,095 advertisements from 488 discreet companies to which Complainant could respond. These advertisements represented 830 positions which were run a total of 1,095 times (RXR-26, App. A-I, index). Of these advertisement, Cimino determined that 231 were for positions for which Complainant was qualified. The remaining 864 were for companies which would have a need for someone with Complainant's qualifications, and to whom Complainant could have sent a resume (RXR-26, 2). The salary mean of positions which listed salary information was $65,000.00 per year (RXR-26, 3). However, of the advertisements only 104 listed salary information (RXR-26, att.9). He testified that between six and seven such advertisements appeared each week and an prudent individual would spend approximately twenty hours a week in job search activities (Tr. 888). This activity would include searching for companies for which one would be qualified to work and contacting them via acquaintances and resumes (Tr. 904).

[67]Cimino defined reasonably diligent effort as "approximately 50 percent of the normal activity . . . making telephone calls, responding to ads, doing mailings. In essence . . . making a job out of seeking a job" (Tr. 905). The remainder of time should be spent "physically visiting individuals perhaps over a lunch . . . in networking face to face" (Tr. 905). Cimino indicated that an individual could make seventy to ninety networking contacts per week including follow-up calls on resumes sent (RXR-26, 5).

[68]Cimino agreed that Complainant had some promotional potential within the nuclear industry but repeatedly stated that without "line" experience he was unlikely to obtain a CEO position (Tr. 1237).

incentive compensation (Tr. 886). On cross-examination, Cimino testified that an employee's lawsuit against a previous employer is not relevant to the individual's ability to find alternate employment (Tr. 933).[69] Cimino further testified that an individual who engaged in whistleblowing activities "for the betterment of the company or the environment...that that could be construed by a new employer as a plus" (Tr. 1212).[70] He admitted that a lawsuit against a former employer would be a consideration by a future employer especially if the lawsuit was not justifiable (Tr. 1247-8). Cimino indicated that, in the power industry, only ten percent of positions are publicly advertised. Cimino testified that such companies generally attempt to first find individuals through networking or use of a recruiting firm (Tr. 886-7).

Cimino prepared a second report concerning Complainant's marketability on July 24, 1997 (Tr. 908; RXR-25). In preparing this report, Cimino created a "strawman" who mirrored Complainant's qualifications and experience (Tr. 909-10).[71] Seven of the 114 companies contacted indicated that it would be interested in seeing the individual described or in seeing his resume (Tr. 912-3; RXR-25, 2). Another seventeen companies indicated that it had a position opening in the recent past or anticipated an opening for which the individual described would be qualified (Tr. 913; RXR-25, 2). The salaries offered by these companies ranged from $85,000 to $100,000 per year, exclusive of benefits (Tr. 915). No individuals contacted identified the "straw man" as Complainant (RXR-25, 2). Based on this information, Cimino opined that, "with a consistent effort in the current market . . . had he exhibited diligent effort, [Complainant] would have been able to find a position within the nuclear industry" (Tr. 916). Cimino further concluded that Complainant's "situation" would not impede his job search (RXR-25, 3).

Cimino testified that, to the best of his knowledge, he had never submitted a candidate for a position who was a whistleblower, but acknowledged that this is not information he seeks (Tr. 939). Cimino indicated that it would not be unusual for an individual to search for eighteen to twenty-four

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[69]Cimino was under the mistaken impression that Complainant was terminated for reasons other than his protected activity (Tr. 1234).

[70]On cross-examination, Cimino reiterated this belief that a "watchdog" would be considered a valuable asset to a nuclear operations company. He testified that an individual who would carefully watch management to assure that they did not cross one of the innumerable regulatory lines would be an asset to such a company (Tr. 1444-5).

[71]

> A marketing program was develop [sic] which contained a resume, a presentation outline which highlighted this straw man's strengths and key value points. In addition, a marketing script and other documentation was completed. . . . This 'straw man' was presented as an individual who was but is no longer working in the nuclear utility industry. He is presently employed in another industry with a multi-billion dollar company and is desirous of returning to the nuclear field. Neither personal names, nor addresses were mentioned. Also, the names of Georgia Power Company and United Parcel Service were rigidly avoided (RXR-25, 1).

All companies contacted were nuclear operators or involved in the nuclear industry (RXR-25, 5). The "strawman" differed from Complainant in that Cimino told prospective nuclear industry employers that Complainant had been downsized and had left the company (Tr. 917).

months for a position consistent with their career path, and that it would be reasonable for Complainant to hold out for a position with comparable compensation and promotional potential, at least "for a period of time" (Tr. 941, 952-3). Cimino acknowledged that the period from 1990 to 1993 represented a particularly difficult time for managers and executives to find employment (Tr. 944). Cimino considered Complainant's decision to devote substantial time to litigation efforts in reaching his conclusion that he had not expended reasonably diligent efforts to find alternate employment (Tr. 946-8). Complainant had been informed by Griswold that he should maintain records of all letters sent and log all calls made. Cimino found Complainant's lack of such documentation to be evidence of his failure to exert diligent effort (Tr. 1213).

Cimino reviewed the report and deposition of David Griswold, of R.L. Stevens. Cimino found that without further documentation of Complainant's efforts, the fact that R.L. Stevens had provided him with a list of companies to contact was not relevant (Tr. 1201-2). However, Cimino indicated that such blind resume submissions were not useful in obtaining an executive position such as Complainant sought (Tr. 1238). He indicated that much of Griswold's testimony as to Complainant's efforts was based on Complainant's own self-reporting and not on any independently verifiable source (Tr. 1205).

M. **Testimony of David H.W. Griswold (& Deposition Testimony)**

Griswold has been employed in the professional career services field since 1979 and specializes in the placement of senior executives (Tr. 1487, 1489). He has placed approximately 400 individuals in senior level management and corporate executive positions (Tr. 1490). Griswold went to work for R.L. Stevens in 1990 as a managing partner until 1993 and then took the position of general manager of the Atlanta office (Tr. 1491). He testified that in 90+ percent of unemployed clients' cases, he is able to find work. Sixty percent of these individuals find work at a higher salary (Tr. 1642-3). Griswold worked with Complainant from April through September 1992 (Tr. 1563). Complainant's relationship with R.L. Stevens was terminated prematurely because of his inability to make the final payment for services (Tr. 1623).

Griswold explained that R.L. Stevens had two program options for clients and Complainant opted for the full service program (Tr. 1493; CX-62). Griswold was assigned to counsel Complainant, as he worked with most of the senior executives retaining R.L. Stevens (Tr. 1496). Griswold testified that clients of R.L. Stevens were given extensive "homework," which he estimated would take approximately 20 to 24 hours to complete (Tr. 1497). Clients were also sent to an all day seminar to discuss interview strategies and research possibilities (Tr. 1497). R.L. Stevens would then assist the client in preparing a resume, cover letter and marketing letters and would move the client to the implementation phase of the job search (Tr. 1498). Griswold testified that Complainant followed this program and had an "exceptionally positive and conscientious" attitude (Tr. 1498-9, 1520). Griswold was certain that Complainant would be successful in his job search within a "short period of time" (Tr. 1518). Complainant kept Griswold advised of his progress and Griswold found him to be doing an "excellent job of implementation in terms of contacting people and getting out letters and doing the various requirements of the plan".

Griswold testified to Complainant's strengths in seeking new employment:

> one of Marvin's major assets was his ability to manage projects and he had managed multiple projects. . . . We also felt that his ability to organize . . . and that could include scheduling and planning, coordinating were strengths. We also felt that he was strong in the areas of financial controls. He had had exposure to projects that were certainly bottom line driven and he had good experience in that area. . . . I felt his communication skills were exemplary. And we felt that he had the ability to train others (Tr. 1522).

He further testified to Complainant's weaknesses, "Any time someone is unemployed that becomes a concern. How they were, the events leading up to that termination are always a concern" (Tr. 1522). He testified that the job search of an individual involved in litigation would be negatively affected due to the work involved in pursuing litigation (Tr. 1494).

Griswold also assisted Complainant in targeting recruiters and organizations for contact with either a resume or marketing letter (Tr. 1508). After an initial attempt the field of search was expanded because Complainant was not getting the contacts hoped for in the "energy field" (Tr. 1509-10). Letters were sent to approximately 15 to 20 "major retainer firms" (Tr. 1523).[72] Griswold indicated that he would not have recommended that Complainant contact any of the recruiting firms listed by Cimino, as they were not recruiting for positions for which Complainant was qualified (Tr. 1529-30; RXR-26, att. 11). Further, the organizations listed in RXR-26, attachment 7 would provide little benefit to someone with Complainant's background (Tr. 1556). Griswold testified that recruiting firms would check an applicant's background and references and would look into any employment-related lawsuits (Tr. 1525). Complainant was contacted by at least one of these firms, but the firm "dropped him" and Griswold found this unusual (Tr. 1526-7). Griswold recommended against making follow-up calls to recruiters and applications from advertisements as it would not be very productive (Tr. 1531-2). He further testified that "cold calling" was ineffective and detrimental as constant rejection has a negative impact on the attitude of the applicant (Tr. 1532). Griswold recommended against placing "situation wanted" ads as he did not feel it was appropriate for senior executives (Tr. 1566). Griswold testified that Complainant did not exhibit any of the signs of one who was not implementing the marketing plan. He did not offer excuses or list of outside interferences and gave Griswold particular contacts and actions he had taken (Tr. 1534-5). To the best of Griswold's knowledge Complainant did not receive any offers of employment as a result of his work with R.L. Stevens (CX-140).

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[72]Griswold testified that, although both are what is referred to as "headhunters", a retainer firm differs from a contingency firm. The contingency firm is paid only when the company hires the individual recommended. They generally deal with positions paying less than $60,000 per year. Retainer firms are hired to recommend five or six individuals and are paid regardless of whether the individual is hired. These firms deal solely with positions paying more than $65,000 (Tr. 1524).

Griswold reviewed CX-72 and noted that it listed only about 30% of the contacts Complainant made while working with R.L. Stevens (Tr. 1540). Some of these contacts and letters were prepared by R.L. Stevens, but were purged from their computer system within two to three months of creation (Tr. 1541). Griswold testified that Complainant made between eight and twelve primary contacts and thirty to fifty secondary contacts (Tr. 1629).[73] In addition, Complainant informed Griswold that he contacted some of the list of utility companies provided by R.L. Stevens. Griswold could not specifically remember which companies were contacted (Tr. 1631-2). On cross-examination, Griswold admitted that most of his knowledge of Complainant's efforts was based on Complainant's reports to him regarding his job search (Tr. 1638).

Complainant expressed a preference to remain in the Atlanta area, but he was open to employment anywhere in the southeast (Tr. 1513). Griswold was unaware, during the time he worked with Complainant, that Complainant was working full-time for a temporary agency. He further stated that this was an unusual course of action (Tr. 1623-4). Complainant did not inform Griswold that he had obtained permanent employment with UPS until April 1996 (Tr. 1625).

Griswold testified that a pending discrimination lawsuit against one's former employer could be a "very negative aspect" for one seeking a senior executive position (Tr. 1541). He indicated that other senior executives try to stay away from any form of litigation (Tr. 1541). In Griswold's experience, the nuclear industry has specific concerns and problems. Often individuals get "branded" and are unable to find positions in other industries, even within the energy industry (Tr. 1542). He further indicated that the nuclear industry was a tight knit industry, where "everybody tends to know everybody at senior levels" (Tr. 1543-4). This attribute of the industry would make personal contacts even more important in obtaining a position (Tr. 1543). All these factors would make it very difficult for Complainant to obtain a position, either within or outside the nuclear industry, without a recommendation from someone at GPC (Tr. 1545).[74] That Complainant had no references from GPC would be very damaging to his obtaining employment in the nuclear industry (Tr. 1549).

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[73]At his deposition, Griswold testified that he made between 15 and 20 primary, and 30 and 40 secondary contacts. However, at the hearing he testified that he made between 8 and 12 primary, and 40 and 50 secondary contacts (Tr. 1629; RXR-15, 175-6).

[74]In an affidavit prepared on April 4, 1996, Griswold concluded that:

1. There is a negative perception — not only in the nuclear industry but throughout industry in general — that works against an employee who files a discrimination suit against their employer.
2. I understand from Mr. Hobby, publicity surrounding his filing a discriminatory case appeared in industry publications and may have become known to potential employers as well as friends and associates of Mr. Hobby's.
3. Allie industries such as architect/engineers, construction companies, and management consultants also could have access to information about the filing of Mr. Hobby's law suit.
4. Friend sand associates of Mr. Hobby's within the industry appeared to be unable or unwilling to assist him in his search for employment (CX-140).

Griswold determined that Complainant would not be an appropriate candidate to begin a consulting business on his own (Tr. 1511). He came to this conclusion based on Complainant's lack of start-up funds and identifiable client base (Tr. 1511). Griswold opined that Complainant had excellent writing skills and communicated "exceptionally well" (Tr. 1513). Because of this assessment, Griswold did not feel it necessary to review each letter Complainant sent out (Tr. 1513). Griswold was surprised that Complainant was unable to secure an interview (Tr. 1642). He attributed this failure to Complainant's legal proceeding against GPC (Tr. 1645).[75]

Griswold found Complainant's effort exerted in obtaining employment to be "very prudent" (Tr. 1560). He found Complainant's actions in pursuing only employment with Oglethorpe Power for some time to be reasonable especially in light of the nature of position he sought and the nature of the nuclear industry (Tr. 1562). He concluded,

> Q. [I]f it was reworded to say if Mr Hobby had made a reasonable effort to find a new position appropriate with his background and credentials given the fact that he had been terminated from Georgia Power, sued the company, the company did not provide him with a reference, and his name appeared in industry publications and identified him as a whistleblower, would it be reasonable that he would be able to obtain a job in 12 months following his termination?
>
> A. Based on all that information it would be difficult if not almost impossible within a 12-month period of time in and around his industry. Outside his industry it would still be a problem and at his level of income would extend the search perhaps longer.
>
> Q. During the time that you worked with Mr. Hobby, if you would turn to the third conclusion, would you agree that during the time you worked with Mr. Hobby that the third conclusion is false?
>
> A. I feel very confident that within the time I worked with him that he contacted recruiting firms and that he targeted companies that were commensurate with his background and credentials (Tr. 1565).

He further concluded that Complainant was "on track for very senior management which could include president or CEO" (Tr. 1567).[76] He noted that Complainant had filled many positions which would give him broad experience with the company, a track often followed by senior level management (Tr. 1567).

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[75]Griswold admitted that he had no contact with the utility companies to determine if this, in fact, was the problem. Nor was he aware of any specific negative publicity related to Complainant's lawsuit (Tr. 1649).

[76]After discussions with Complainant in preparation of his resume and review of Cimino's report, Griswold concluded that Complainant's previous positions could not be classified as "coaching" or "spectating" as characterized by Cimino (Tr. 1504).

Griswold reviewed the advertisements referenced by Cimino and found that some of those ads were "totally inappropriate" for Complainant (Tr. 1569; RXR-26, App. A-1 and A-2). Griswold categorized the ads into three categories: 1) ads that were worthy of a response; 2) "long shots"; and 3) ads that were completely inappropriate (Tr. 1569). He found 508 of the 830 positions listed by Cimino were in category three (Tr. 1569-70; CX-156). An additional 229 positions were considered "long shots" through which Complainant had very little chance at successfully obtaining employment (Tr. 1571). Twenty-seven of the 830 ads were duplicates (Tr. 1571). Griswold then reviewed the remaining 64 ads based on the following five factors:

1) The job identified offered Mr. Hobby equivalent promotional opportunities;

2) The job identified offered Mr. Hobby equivalent compensation;

3) The job identified offered Mr. Hobby the equivalent level of responsibility;

4) The job identified offered Mr. Hobby equivalent working conditions;

5) The job identified offered Mr. Hobby equivalent status.[77]

Only eight ads met three or more of these factors and only four ads met all five factors (Tr. 1610, CX-156). Griswold acknowledged that, although rated a 2 or a 3, some of the ads were from companies that Complainant could contact to determine if other positions were available for which he would be qualified (Tr. 2402).

Griswold questioned Cimino's methodology in presenting the "strawman" for positions. He indicated that randomly calling companies was not a cost or time effective manner for finding a new position. In addition, he testified that a company requesting a resume may not actually have a position open (Tr. 1612-14).

Griswold agreed that, under normal circumstances, Complainant should have taken advantage of the offer of the outplacement services of Payne-Lendman when offered by Respondent (Tr. 1618). Payne-Lendman is considered a "good" outplacement firm (Tr. 1619).

In obtaining high level management positions, Griswold testified that an applicant's style and character are equally as important as his/her experience. "Style" includes anything from dress to mannerisms and presence (Tr. 1514-15). Griswold testified that Complainant possessed a style appropriate for one in a high level management position, including CEO (Tr. 1516). Complainant was well-liked by the staff at R.L. Stevens and they would take extra steps to assure that his work was done efficiently, correctly and punctually (Tr. 1518). R.L. Stevens would often offer typing services in conjunction with its full-service clients (Tr. 1519). Nothing in Complainant's work history or style would have prevented him from continuing to move up the corporate ladder (Tr. 1518).

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[77]On cross-examination, Griswold testified that he understood that Complainant held a position equivalent to an "officer," a VP, senior VP or executive VP while employed by GPC (Tr. 2393).

Griswold testified that it would be difficult for Complainant to obtain a position with a wage more than 20% less than his salary at GPC. Employers are hesitant to hire over-qualified individuals because they are likely to become bored and move on to new opportunities. Therefore, Complainant would find it difficult to obtain an executive position which earned less than $80,000 per year ((Tr. 1559).

N. **Testimony of Dr. Jerome M. Staller**

Dr. Staller is the President of The Center for Forensic Economic Studies and "assessed the economic impact of the termination of Mr Hobby" (Tr. 720-21).[78] In preparing his April 1996, report (RXR-10), Dr. Staller reviewed a GPC Position Questionnaire, the Recommended Decision and Order of ALJ Joel Williams[79], a report prepared by Joel Morse, Ph.D. (a financial economist), letters between counsels for Complainant and Respondent regarding Complainant's compensation at GPC, the Complaint and answers thereto, the report of James Cimino, and an affidavit by Howard Winkler[80] (Tr. 722; RXR-10, 2). Dr. Staller also relied on the Survey of Displaced Workers to determine Complainant's economic loss based on possible re-employment and duration at GPC (Tr. 723-4).[81] He considered Complainant's work history and earnings, but did not interview Complainant (Tr. 726, 736).

Dr. Staller first considered Complainant's pre-termination capacity: earnings, fringe benefits, and how long Complainant would have remained employed at GPC absent his termination (Tr. 725). Second, Dr. Staller considered Complainant's post-termination capacity, both his earnings at UPS and the indications of a labor market study as to how much Complainant could have earned (Tr. 725). His report relies on the figures provided to him by Steven Wilkinson of GPC as to bonus amounts and salary increases (Tr. 727). Dr. Staller's conclusions are based on several assumptions:

1. Complainant may have been downsized had he remained employed with GPC (RXR-10, 4);

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[78]Dr. Staller's curriculum vitae appears at RXR-9.

[79]Dr. Staller was not provided with the Secretary's Decision and Order in this matter.

[80]Winkler is a Southern Company Staffing Manager (RXR-10, 2). Winkler submitted an affidavit in this matter, but, at the hearing, noted that it contained several errors (Tr. 1716; RXR-2).

[81]The Survey of Displaced Workers is a result of the monthly Current Population Survey. Those who responded affirmatively to the Current Population Survey's question of "have you lost your job?" were sampled in the Survey of Displaced Workers. They were then queried as to how long it took to find another job, at what salary, what was the result one, two, and five years later (Tr. 723). Displaced workers are "persons 20 years and older who lost or left jobs because their plant or company closed or moved, there was insufficient work for them to do, or their position or shift was abolished" (CX-135, 3). Dr. Staller testified that this may or may not have been the definition for the survey years upon which he relied. He indicated that the definition had changed, but was unable to indicate what changes had been made (Tr. 765-7).

2. Complainant was a level 20 (10) employee earning $103,104 in 1989 (RXR-10, 4) ;

3. The average annual pay increase at GPC has ranged from three to five percent and Staller used four percent for his calculations (RXR-10, 5);

4. Health coverage was valued at $91.58 per month from February 1990 to December 1990 and at $90.87 per month from January 1991 to September 1993 (RXR-10, 5-6);[82]

5. GPC contributed an amount equal to 0.8% of earnings into ESOP accounts (RXR-10, 6);

6. GPC contributed $0.75 for every $1.00 of employee contribution into ESP accounts up to 6% of base salary (RXR-10, 6);

7. Any amounts received by Complainant for unemployment or severance should be deducted from calculation of economic loss (RXR-10, 6);

8. Had Complainant made a reasonable effort to find a new position, he could have done so by March 1, 1991 at a salary of $70,000, and that his earnings would have caught up to his projected earnings absent termination by 1997 (RXR-10, 7-8);[83]

9. Had Complainant obtained comparable employment he would have had comparable retirement benefits of 5.3% of his earnings (RXR-10, 8);

10. Interest would have accumulated at the rate set forth in Stipulation Number 8 (RXR-10, 9); and

11. No front pay loss (RXR-10, 9).

Dr. Staller concluded that Complainant should have been able to earn approximately sixty to eighty percent of what he was earning prior to his termination and should have been able to obtain alternative employment within three to six months (Tr. 731). In his calculations, Dr. Staller increased Complainant's earnings at four percent and added health coverage, ESOP, and savings plan (Tr. 732). He concluded that, through the end of 1996, Complainant lost $388,445.00 (Tr. 733; RXR-10, 10). Dr. Staller also calculated Complainant's loss using his actual salary from UPS and concluded that, through the end of 1996, Complainant lost $1,236,699.00 (Tr. 733-4). Dr. Staller stated that because of Complainant's history, experience, and the down-sizing of management at GPC, Complainant had a "fair probability of getting whacked" (Tr. 781).

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[82]These figures were obtained from GPC as COBRA rates. Dr. Staller did not consider Complainant's actual medical insurance costs (Tr. 814-6).

[83]This assumption is based on the report of James Cimino of Executive Search, Ltd. (RXR-10, 7). Dr. Staller did not independently verify any of the information which forms the basis of Cimino's conclusions (Tr. 741).

On cross-examination, Dr. Staller agreed that statistical evidence that is grounded in facts specific to the individual is more reliable in determining damages (Tr. 747).[84]

O. **Testimony of Dr. Steven I. Jackson (& Deposition Testimony)**

Dr. Jackson is currently an adjunct associate professor of public policy for Cornell University, based in Washington, D.C., and teaches two courses on research methodology. He is a fellow with the Center for the Study of American government at Johns Hopkins University and also teaches a course in research methodology for master's degree candidates. Dr. Jackson testified that most of his research involves economics and the use of statistics and statistical research (Tr. 2177-80).

In reaching his conclusion, Dr. Jackson reviewed Cimino's reports (RXR-25; RXR-26), Dr. Soeken's deposition, ADM Wilkinson's deposition, Dr. Glazer's deposition[85], Dr. Staller's study on economic loss (RXR-10), and data from the survey of displaced workers (Tr. 2183).[86] Dr. Jackson was not aware of the efforts of Complainant to obtain a position in the nuclear industry or outside that industry (Tr. 2662). Further, Dr. Jackson testified that he was not personally aware of the response nuclear employers would have to Complainant's status as a whistleblower, but relied upon ADM Wilkinson's analysis (Tr. 2720-1). Based on the review of the evidence, Dr. Jackson opined that Complainant's chances of re-employment within the nuclear industry were reduced because of his whistleblower status (Tr. 2723).[87]

Dr. Jackson testified that the survey of displaced workers does not include individuals who have been terminated for cause by their employer, nor does it include individuals who could be classified as whistleblowers (Tr. 2184-5). He indicated that based on this, the survey of displaced workers, relied on by Dr. Staller, was relevant only to show a "best case for a terminated worker, as a terminated worker wouldn't do any better than a displaced worker" (Tr. 2186). Dr. Jackson further

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[84]"Estimates of damages based entirely upon statistics and assumptions are too remote and speculative in order to form a reliable basis for a calculation of lost future income or loss of earnings capacity. Such evidence must be grounded up on facts specific to the individual whose loss is being calculated." Jerome Staller, Ph.D, Bruce J. Klores, Esq, *Faulty Damage Calculations Can Ruin the Case*, PROD. LIAB. L. & STRATEGY, June 1993.

[85]Dr. Jackson opined that Dr. Glazer's methodology was "more than reasonable" for studying whistleblowers (Tr. 2205).

[86]RXR-35 contains Dr. Jackson's notes regarding his review of these materials. Dr. Jackson was paid an $1,000 retainer, $200 an hour for non-court work and $300 an hour for in-court testimony (Tr. 2647).

[87]He opined that this conclusion would remain the same regardless of the production of a reference letter from a former supervisor at GPC. Dr. Jackson did not have the information upon which to base an opinion of Complainant's possibilities for employment in other industries in light of his whistleblowing activity (Tr. 2723).

testified that the conclusions drawn by Dr. Staller were not supported by the data in the survey of displaced workers (Tr. 2191-2; RXR-10, 7).[88]

Dr. Jackson found serious problems in the research methodology used to create Cimino's report (Tr. 2198; RXR-25). He found the results of this research to be consistent with research that is designed to seek "answers that are consistent with a predetermined answer and found them not to meet standards of reliability and validity (Tr. 2198).[89] He opined that the objectives of the study were inconsistent with an unbiased, impartial effort to determine interest in a candidate as the goal was to get a "send-out" (Tr. 2199). The second problem with methodology that Dr. Jackson discovered was the lack of a protocol for categorizing responses to inquiries (Tr. 2200).[90] The third problem with methodology which Dr. Jackson identified was Cimino's failure to seek what Jackson felt was the most relevant evidence on the issue of Complainant's ability to find a job. Specifically, Dr. Jackson opined that the central inquiry should have been "whether Mr. Hobby would have unusual difficulty getting an opening for which he's qualified given having been terminated as a whiestleblower and then perhaps as having filed a complaint over that termination" (Tr. 2203). Dr. Jackson concluded that Cimino's research methodology could not withstand "the review of my undergraduate course" (Tr. 2203).

Dr. Jackson also testified to problems in research methodology in Cimino's second report regarding Complainant's compatibility with a CEO position (Tr. 2212 *et. seq.*; RXR-26). He pointed to Cimino's failure to delineate the reasons for using only 59 of the 71 executives listed in the database (Tr. 2213-15; RXR-26, att. 12).

P. **Deposition Testimony of Dr. Penina Glazer (CX-47)**

Dr. Glazer is a professor of history at Hampshire College (CX-47, 5).[91] Dr. Glazer conducted a six-year study on sixty-four whistleblowers in government and industry which resulted in the

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[88]Dr. Jackson specifically noted that when Dr. Staller indicated that 84% of displaced workers were re-employed that he failed to indicate that re-employment includes full-time, part-time and self employment or unpaid family workers (Tr. 2191-2). Dr. Jackson testified that only 60% of displaced workers found full-time employment (Tr. 2193).

[89]Reliability means that "if two different people gathered the same information in the same way and looked at it, they would categorize it the same way for the purposes of the analysis" (Tr. 2703). Problems in the reliability of research methods raise concerns about the validity of research conclusions (Tr. 2201-2).

[90]Dr. Jackson opined that the seven "yes" answers only requested that a resume be faxed and this response does not necessarily indicate a present job opening (Tr. 2200). In addition, several of the "not now" answers did not indicate that a position would be open in the future (Tr. 2201).

[91]Dr. Glazer's curriculum vitae appears as exhibit 1 to her deposition (CX-47, 11, exh. 1).

publication of several articles and a book (CX-47, 6-7).[92] Penina M. Glazer & Myron P. Glazer, Whistleblowers: Exposing Corruption in Government and Industry (1989). Of these whistleblowers, thirty-six were professionals and managers and twenty were in private industry (CX-47, 12-13). Since the publication of this study, Dr. Glazer has made an attempt to remain current in the area of whistleblowers through continued study and conference attendance (CX-47, 13).

Dr. Glazer's study found that twenty of the whistleblowers actually kept their current positions following the whistleblowing activity. However, none of the twenty whistleblowers in the private sector remained in their jobs (CX-47, 14). Forty-one of those studied were terminated from their positions. Ten of these individuals were able to obtain substitute employment in a "short time." However, none of the ten found positions within the same industry and same status they had prior to their whistleblowing activity (CX-47, 15).[93] Of the remainder, eighteen were eventually employed and ten remained unemployed following the six-year study.[94] Those who did find employment did

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[92]This study was based on 64 interview with whistleblowers and additional interviews with the spouses of whistleblowers, reporters, congressional aides, state legislators, and public interest lawyers. In addition Dr. Glazer reviewed documents on between one and two hundred whistleblowers. Dr. Glazer testified that there were approximately eight individuals included in her study who were employed in the commercial nuclear power industry (CX-47, 31). She used the following criteria to determine which individuals should be included in her study:

> Justifiable acts of whistleblowing include that the act of whistleblowing stem from appropriate moral motives of preventing unnecessary harm to others; that the whistleblower use all available internal procedures for rectifying the problematic behavior before public disclosure, although special circumstances may preclude this; that the whistleblower has evidence that would persuade a reasonable person; that the whistleblower perceives serious danger that can result from the violation; that the whistleblower act in accordance with his or her responsibilities for avoiding and/or exposing moral violations; the whistleblower's action has some reasonable chance of success (CX-47, 80-1).

The purpose of this study was:

> To do a historical account of the rise of whistlewblowing in contemporary society, and the significance of that movement; the second was to analyze the process that whistleblowers undergo from the point at which they first identify a significant issue of immoral, unethical or illegal behavior; their decision to come forward and speak up about it and their — and what happens to them in that process (CX-47, 11).

Dr. Glazer further described the participants:

> Most of the people in the study, two thirds, were in their thirties or forties, age-wise; they were in sort of a height in their careers or in the center of their careers. . . . They were people who had excellent performance appraisals, were very identified with their work and great believers in the mission of their organization (CX-47, 19).

[93]Dr. Glazer provided the following examples of the positions taken by whistleblowers following termination:

> James Boyd who was a (sic) aide to Senator Thomas Dodd became an investigative reporter; Frank Camps who was a senior design engineer at Ford became an expert witness in automobile accident cases. Some people who were doctors or lawyers went into private practice or started their own business (CX-47, 15).

[94]Dr. Glazer indicated that the failure to obtain a position may be due to "black-listing" or reputation as a "troublemaker." However, she did not consult any of the employer's to determine if this was the reason for rejecting

not "usually" find "comparable employment" (CX-47, 16-17). Dr. Glazer testified that in several cases whistleblowers were able to find employment in the same industry, but were later terminated when their whistleblowing activity became known to their new employer (CX-47, 18).

Following her research, Dr. Glazer concluded that "it's extremely difficult, if not virtually impossible, to have comparable work in the same industry" following whistleblowing activity (CX-47, 19). She identified the general stages which a whistleblower goes through (CX-47, 20). First, the employee observes or is asked to participate in behavior which is illegal. Usually, the whistleblower struggles with the decision to come forward for some time, and frequently first consults a supervisor for advice. After time, the whistleblower comes forward within the organization and is told to ignore the problem. Dr. Glazer observed that it took between one and two years for the whistleblower to report the problem outside the organization. After this report, virtually all whistleblowers experience some sort of retaliation, from termination to isolation to assignment of remedial tasks (CX-47, 20-1). Most whistleblowers were surprised at the intensity of the retaliation experienced, and many experienced symptoms of stress and depression (CX-47, 23). Generally, the whistleblower then sought assistance from outside organizations (public interest organizations, reporters, attorneys) and proceeded to fight the retaliation. The whistleblower sought vindication and compensation for damages. Finally, the whistleblower is able to recreate their career and life beyond the case (CX-47, 21-2). Dr. Glazer testified that the litigation involved in fighting these claims can become a full-time job due to the expense and amount of time involved (CX-47, 26). Dr. Glazer concluded that although the law protects the whistleblower, it is still a very difficult thing to do (CX-47, 24).

Dr. Glazer reviewed the Secretary's decision, the deposition of ADM Wilkinson, some performance appraisals and other "supporting documents" in this matter (CX-47, 34).[95] Through review of these documents, she concluded that Complainant's case paralleled those in her study (CX-47, 34-5).[96] She indicated that the industry in which the whistleblower worked as well as the time at which he/she was terminated would affect the difficulty in obtaining alternative employment (CX-47, 97). Dr. Glazer testified that personal contacts were important in obtaining a new position, especially for those who found positions in a short time (CX-47, 97-8).

Q. **Deposition Testimony of Dr. Donald R. Soeken (RXR-16)**

Dr. Soeken is a retired U.S. Public Health Service officer and prepared a report regarding Complainant's efforts to obtain employment following his termination by Respondent(RXR-16, 13,

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the applicant, but relied upon the interpretation of the whistleblower him/herself and others who had contact with him/her (CX-47, 99-102, 115-16).

[95]Dr. Glazer admitted that she had no personal knowledge of Complainant's case nor any of the specifics beyond the documents provided to her (CX-47, 34).

[96]Dr. Glazer charged $250 an hour for preparation and $350 an hour for testimony in this proceeding (CX-47, 43-4).

exh. 2).[97] He reviewed the Secretary of Labor's August 1995 decision, the deposition of ADM Wilkinson, the deposition Dr. Glazer, the affidavit of Griswold, Cimino's report dated September 30, 1996, the executive appraisal of Complainant dated July 15, 1986, the deposition of Kerry Adams, and spoke to Complainant concerning this matter (RXR-16, 4-6). Dr. Soeken performed a national survey of whistleblowers, completed in 1987 (RXR-16, exh. 6).[98]

In his report, Dr. Soeken indicated that most whistleblowers make ethical judgements through universalism or exceptionalism. Those who hold moral codes as universal believe that the best solution is always found by following universal moral codes. Those who follow the exceptionalism rules believe that rules must be applied in a way that provides the greatest good for the greatest number of people. In addition, most whistleblowers are between the ages of 33 and 45 and have been employed in their current position for between five and eight years and a work history prior to whistleblowing of thirteen years. Generally whistleblowers first report violations to their supervisor and the this fails seek higher authority for support. Dr. Soeken opined that Complainant fit both the demographic and motivational framework of most whistleblowers. He indicated that Complainant viewed his position with great seriousness and acted out of conscience in reporting apparent violations (RXR-16, exh. 2, 2). He further detailed the emotional distress that Complainant felt due to his depleted finances and repeated requests of friends and family for money (RXR-16, exh. 2, 3).[99] These sorts of emotional and reputational harm are not uncommon to whistleblowers (RXR-16, exh. 2, 4).

Dr. Soeken testified that it was his general impression that employers within the nuclear industry would not hire an individual identified as a whistleblower (RXR-16, 46-9). He had identified such an anti-whistleblower sentiment or "code of silence" at other companies he had inquired about in the course of preparing testimony in other matters (RXR-16, 55 *et. seq.*). Specifically in his participation in the Mosbaugh v. Georgia Power Company matter, he observed what appeared to be an anti-whistleblower atmosphere among Respondent's management and testified that this atmosphere still exists (RXR-16, 63-4). Dr. Soeken testified that, although he has had no direct contact with them, it is his professional opinion that there is probably an anti-whistleblower atmosphere at Consolidated Edison of New York because they failed to hire Complainant and have

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[97]Dr. Soeken's curriculum vitae appears as exhibit 5 of his deposition (RXR-16, exh. 5). Dr. Soeken was compensated at a rate of $250 per hour before the deposition and $350 per hour for depositions (RXR-16, 38). He owns a farm known as the "Whistle Stop" which he uses as a retreat center for whistleblowers and their families (RXR-16, 34).

[98]Karen L. Soeken, Ph.D. & Donald R. Soeken, Ph.D., A Survey of Whistleblowers: Their Stressors and Coping Strategies (March 1987). Drs. Soeken sent out 233 questionnaires to whistleblowers identified by the Government Accountability Project and received 87 responses to questions regarding whistleblowing activities and effects on physical, emotional, social and spiritual health (RXR-16, 172-3).

[99]Dr. Soeken indicated that Complainant had to ask ADM Wilkinson as well as his parents for money. He also had to inform the family who had provided his college scholarship that he had been fired from this job with Respondent (RXR-16, exh. 2, 3).

not since offered him a position (RXR-16, 93-4, 100, 106). He further testified that the main reason Complainant was not hired by Oglethorpe Power was because of his whistleblowing activities (RXR-16, 241). Dr. Soeken compared whistleblowing to a permanent disability which stays with an employee and prevents employment (RXR-16, 132-3).

In working with nuclear whistleblowers, Dr. Soeken provides advice on the emotional and psychological effect of job searching. He opined that typical networking can be depressing for a whistleblower because one's old friends and contacts will not associate with the whistleblower (RXR-16, 143-4). He indicated that the whistleblower should not be surprised if networking is ineffective in obtaining a new position and testified repeatedly that no nuclear utility company would hire Complainant (RXR-16, 144-7).[100] He testified that it was common practice in the nuclear industry to provide negative references for whistleblowers when asked by prospective employers (RXR-16, 228-33). Dr. Soeken opined that Complainant's reputation in the nuclear industry has been "destroyed" by Respondent (RXR-16, 274).[101]

Dr. Soeken testified that he questioned some of the conclusions reached by Dr. Glazer in her book and noted that it is rare for a whistleblower to get a "full-blown career" job after whistleblowing (RXR-16, 194). He indicated that Dr. Glazer's "bias" might have been to show that there is a life after whistle blowing. There is certainly, but it isn't as rosy as sometimes they painted" (RXR-16, 195). Dr. Soeken also reviewed Cimino's report and found some of his conclusions "ridiculous" and based on the "ignorance of this individual who doesn't know anything about whistle blowers," and opined that had Complainant followed Cimino's steps he would have been unsuccessful in obtaining a comparable position (RXR-16, 289 *et. seq.*). He opined that it did not matter if Complainant searched for positions at a lower salary because in any management position he would be passed over because of his whistleblowing activities (RXR-16, 292).

DISCUSSION

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[100]Dr. Soeken testified that he would have advised Complainant to:

> Go to Admiral Wilkinson, do some of the things. Stick with him. He knows a lot of the people in the industry. Go see Paul Blanch and talk to these people and see if they can figure out way to weasel you in somewhere. . . .
>
> It would never be at the level that he was at, never. There is no way in hell that he's ever going to get to that level because those people know everybody. That's the reason they're in those positions. They know everybody, and they know what they have to do to keep the right team in place. They're never gong to hire him.
>
> So no matter who knows him, and if the CEOs of all these other companies — as soon as they find out who he is, they're not going to hire him because they won't be able to trust him (RXR-16, 144).

[101]Dr. Soeken specifically noted a front-page story in the Atlanta Journal/Constitution which named Complainant as a whistleblower as well as other public documents (RXR-16, exh. 10-14).

The Act and implementing regulations provide that:

> [T]he Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary. 42 U.S.C. § 5851(b)(2)(B).
>
> If the Secretary concludes that the party charged has violated the law, the final order shall order the party charged to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former or substantially equivalent position, if desired, together with the compensation (including back pay), terms, conditions, and privileges of that employment. The Secretary may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant. 29 C.F.R. §24.6(a)(2).

A. **Single Employer or Joint Employer Doctrine**

On June 3, 1997, Respondent filed a Motion for Summary Decision on the employer status of all Southern System companies besides GPC. None of the subsidiaries of Southern Company (beside GPC) have been joined as Respondents in this proceeding. ALJ Barnett deferred ruling on this motion until the completion of the hearing.

Absent special circumstances, a parent corporation is not responsible for a subsidiary's violations of law. NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331 (6th Cir. 1990); Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985); Hassell v. Harmon Foods, Inc., 484 F.2d 199 (6th Cir. 1972).

The courts have articulated a formulation to determine when a parent-subsidiary relationship is not a "normal one" in assessing whether the two will be considered as a single employer. Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2 & 5, 93-CAA-1, 94-CAA-2 & 3 (ARB June 14, 1996); Arbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Fullerton Transfer, 910 F.2d 331.

> The most important requirement is that there be sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer. When such a degree of interrelatedness is present, we consider the departure from the "normal" separate existence between entities an adequate reason to view the subsidiary's

> conduct as that of both. . . . For guidance in testing the degree of interrelationship, we look to the four-part test formulated by the NLRB and approved by the [U.S.] Supreme Court . . . which assesses the degree of (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. . . .
>
> The showing required to warrant a finding of single-employer status has been described as "highly integrated with respect to ownership and operations. The test may also be satisfied by a showing that there is an amount of "participation [that] is sufficient and necessary to the total employment process," even absent "total control or ultimate authority over hiring decisions."
>
> Armbruster, 711 F.2d at 1337.

It is not necessary for all four criteria to be present, but the presiding judge must strike a balance among the criteria. Fullerton Transfer, 910 F.2d at 336; Baker v. Stuart Braodcasting Co., 560 F.2d 389, 392 (8th Cir. 1977). However, the key factor is the control over elements of labor relations. Armbruster, 711 F.2d at 1337. For separate companies to be treated as a single employer, the Eleventh Circuit has held that there must be a showing that the separate companies are "highly integrated with respect to ownership and operations" and has used the four-part test articulated above in order to make that determination. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1981) (quoting Fike v. Gold Kist, Inc., 514 F. Supp. 722, 726 (N.D. Ala.), *aff'd*, 664 F.2d 295 (11th Cir. 1981)).

Similarly, a joint employer relationship is found when, despite the absence of common ownership, one entity effectively and actively participates in the control of labor relations and working conditions of employees of the second entity. NLRB v. Western Temporary Services, Inc., 821 F.2d 1258, 1266 (7th Cir. 1987). This determination is based "largely on such factors as the supervision of the employees' day-to-day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, and issuance of operating instructions." W.W. Grainger, Inc. v. NLRB, 860 F.2d 244 (7th Cir. 1988). In Lutheran Welfare Services v. NLRB, the U.S. Court of Appeals for the Seventh Circuit found for joint employer status between an employment agency and two child care facilities where the agency exercised control over the pay scales and employee classification at the facilities; the agency had to approve all promotions and hiring at the facilities; the policies at the facilities had to be approved by the agency; the facilities were required to submit all personnel roosters, organizational charts and evaluations to the agency; and the agency supervised all facility directors. 607 F.2d 777 (7th Cir. 1979). Looking at similar factors, the U.S. Court of Appeals for the Second Circuit found no joint employer status where companies kept separate time, personnel and payroll records for their employees; one company paid hourly while the other paid by the load; the companies maintained different insurance for their employees; and one company paid retirement and sick pay while the other did not. NLRB v. Solid Waste Services, 38 F.3d 93 (2d Cir. 1994).

1. **Interrelated Operations**

Southern Company is a utility holding company with several power company subsidiaries including Respondent. There exist various agreements between the subsidiaries and between the parent and subsidiaries (CX-119).

2. Common Management

Franklin testified that GPC and its Board of Directors have no control over the management of other subsidiaries or the parent company. Several of the executives who testified before ALJ Barnett in this matter had been employed by more than one of the subsidiaries of Southern Company.[102] It appeared that in moving up the executive ladder that it was not entirely uncommon for one to switch corporations. However, Franklin testified that this was only done with the approval and at the request of the hiring corporation.

3. Centralized Control of Labor Relations

In 1995, the administration of human resources functions of all subsidiaries was consolidated into Southern Company Services (SCS). Winkler testified that SCS was responsible for administrative functions only, as a cost reduction method. Each subsidiary remained in control of hiring and firing criteria.

Franklin testified that Southern Management Council was created to evaluate top employees in all Southern System subsidiaries. Dr. Davenport testified that there was some resistance to the management council's programs because the individual subsidiaries wanted to maintain more individual control. GPC still makes its own decisions regarding the hiring and firing of employees. The programs created by the Management Council were informal, and were made specific by individual managers within the system. It was Southern System policy to do a system wide search for executives in level 17 (9) or above positions. However, the final decision was entirely with the hiring corporation. On occasion, employees would be loaned to other Southern System companies, but an administrative billing system was in place to bill the borrowing company for the work performed by the loaned employee.

4. Common Ownership

Respondent is a wholly owned subsidiary of Southern Company. Franklin testified that GPC issues its own securities, has its own Board of Directors and manages its own properties. GPC has no control over the management or operations at other Southern System companies.

5. Conclusion

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[102]Franklin was employed by Alabama Power, SCS, and Respondent (Tr. 371-3). Evans was employed by Mississippi Power, SCS, and Respondent (Tr. 827-8). Winkler was employed by both Respondent and SCS (Tr. 1713). Williams was employed by Respondent and Southern Company (Tr. 1859-60). Eubanks was employed by Respondent and SCS (Tr. 2074-5). Wilkinson was employed by Mississippi Power and SCS (Tr. 2124). Smith was employed by Respondent and SCS (Tr. 2490-1).

I find nothing in the evidence presented which leads to the conclusion that the relationship between Southern Company and its subsidiaries is anything but a "normal" one. Certainly, they share certain interests, as is part and parcel of such a corporate arrangement. However, there is nothing here which amounts to a "special circumstance" to permit joining the parent company. Fullerton Transfer, 910 F.2d 331; Hroch, 757 F.2d at 190; Hassell, 484 F.2d 199.

The Secretary ordered "such further proceedings as may be necessary to establish Complainant's complete remedy." Hobby v. Georgia Power Co., 90-ERA-30 at 28 (Sec'y Aug. 4, 1995). Complainant argues the fashioning of a complete remedy requires that the entire Southern System be included in any ordered remedy. I disagree. The Secretary's order does not grant jurisdiction over parties who were not joined in the lawsuit. Nor is it dispositive in a review of the facts as to the nature of the inter-relationship between subsidiaries of Southern Company.

Upon review of the evidence and Complainant's failure to join other parties, I find that the weight of the evidence does not support a finding of joint or single employer status. I will not, at this point in the litigation, join other parties to fashion a remedy. Therefore, I find that Respondent does not share single or joint employer status with any other Southern System company and Complainant is limited to a remedy from Respondent itself.[103]

B. **Reinstatement or Front Pay**

Reinstatement is the normal remedy for whistleblowers. Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Apr. 10, 1996). Front pay may be appropriate only in cases where antagonism between the parties would render reinstatement ineffective. Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1449 (11th Cir., 1985), cert. denied, 474 U.S. 1005 (1985). However, the Secretary has noted that tension between the Complainant and former supervisors, observed by the ALJ, is not sufficient to warrant an award of front pay over reinstatement. Creekmore, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). The U.S. Court of Appeals for the Eleventh Circuit explained the importance of reinstatement, as opposed to merely monetary damages:

> This rule of presumptive reinstatement is justified by reason as well as precedent. When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. Yet at the same time, there is a high probability that reinstatement will engender personal friction of one sort or another in almost every case in which a public employee is discharged . . . . Unless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases,

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[103]I do caution Southern Company and its subsidiaries against any future discrimination against Complainant based on his protected activity. Much testimony was offered indicating that individuals in one subsidiary may move to another subsidiary to achieve a promotion. Complainant should be offered these opportunities equivalent to others at his level of reinstatement. My ruling here does not provide the other Southern System companies with a loophole through which to discriminate against Complainant in the future.

> and we are not, we cannot allow actual or expected ill-feelings alone to justify nonreinstatement. We also note that reinstatement is an effective deterrent in preventing employer retaliation against employees . . . . Allen v. Autauga County Bd. Of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982).

Complainant can be reinstated to a substantially similar position, if the position in which he served no longer exists. *See*, Creekmore, 93-ERA-24 (ARB June 20, 1996) (Even after sale of a subsidiary the company that retained liability was obligated to reinstate the complainant to a substantially similar position.); DeFord v. Tennessee Valley Authority, 81-ERA-1 (Sec'y Aug. 16, 1984) (The Secretary of Labor stated that, "[i]f [complainant's] former position no longer exists or there is no vacancy, TVA shall apply to the Administrative Law Judge for approval of the job in which it proposes to place DeFord with an explanation of the duties, functions, responsibilities, physical location and working conditions.").

Respondent points to Oliver v. Hydro-Vac Services, Inc., wherein complainant was denied reinstatement because the position had been eliminated. However, in that case the position was filled following Oliver's removal and was later eliminated because of restructuring. 91-SWD-1 at 2 (ALJ Feb. 19, 1997). In the instant matter, the restructuring is inextricably entwined with the discriminatory act. This distinction is important. Although all nuclear duties have been transferred from GPC to SONOPCO, NOCA was set up to be a liaison between these two groups. There is no reason to believe such a liaison between these two subsidiaries would no longer be useful. NOCA was eliminated as part of the discriminatory act against Complainant and such elimination cannot be separated from the wrongful act. I do not find Respondent's argument, that there are no comparable positions available to Complainant, credible. It is undisputed that all of Respondent's nuclear positions have been transferred to SONOPCO. However, Complainant's experience with Respondent is certainly transferrable to other areas of Respondent's business. Respondent, itself, argues that non-nuclear positions with power utilities are the type of positions Complainant should have sought since his termination.

Courts have recognized that the level of a complainant's position are important considerations in determining whether reinstatement is feasible. Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1331 (7th Cir. 1987); Dickerson v. Deluxe Check, 703 F.2d 276, 280 (8th Cir. 1983). Complainant held a general manager position prior to his termination. He seeks reinstatement into a position at a higher level within GPC. If reinstated, he would be in a position of responsibility, presumably with considerable access to documents and facilities. However, none of the executives who testified before ALJ Barnett expressed concerns about Complainant's trustworthiness in an executive position. The only concerns expressed were with regard to Complainant's ability to fulfill his duties.

Franklin testified that it would be "very, very difficult" to reintegrate Complainant into GPC. Franklin also indicated that it would be bad for morale to put Complainant into a position above those who had been working with GPC continually. Franklin and Respondent miss the point of this proceeding. This matter was not remanded to find the path of least resistance for Respondent in compensating Complainant, but to make Complainant whole. The Secretary of Labor found that

Respondent discriminated against Complainant and Respondent can expect to make some sacrifices to correct its wrongdoing. I question whether Respondent finds it good for morale to terminate employees who report violations to the NRC.

I find Respondent's argument that Complainant is not entitled to reinstatement because of his loss of reputation due to his termination ironic. Respondent terminated Complainant because of protected activity, and now seeks to benefit from the fruits of its act of wrong doing. Respondent points to court cases in which reinstatement has been denied due to the complainant's inability to perform the job sought. McKnight v. General Motors Corp., 973 F.2d 1366 (7th Cir. 1992). Any loss of ability suffered by Complainant is due to Respondent's unlawful termination. Complainant attempted to stay current with industry trends by reading those articles to which he had access. I will not allow Respondent to benefit from its act of discrimination.

Dr. Davenport concluded that only two positions had opened since Complainant's termination for which he would have been qualified and those positions were filled with individuals more qualified that Complainant. Dr. Davenport's study, like Folsom's, is flawed in that it failed to consider several positions. In Dr. Davenport's case, these positions were specifically excluded from her search. It seems that Dr. Davenport created a report to reach the conclusion most helpful to Respondent and I do not credit her testimony.

In any whistleblower proceeding in which reinstatement is at issue, there will be some evidence of animosity between the parties. That, in itself, cannot be a reason for denying Complainant this remedy.

Complainant seeks reinstatement in a level 26 (13) position. He recognizes that it will not be an easy transition into any reinstated position with Respondent. However, he indicated that a clear message of support from his superiors would go a long way to re-establishing his credibility in the industry. He further recognized that extensive training would be necessary upon his return to Respondent, because of changes in the industry.

I do not find either of Complainant's methods of calculating back pay and reinstatement level reasonable. The tracking method attempts to track Bowers, an employee who Franklin and Evans testified advanced at an unusual rate. The historical method also seems unreasonable. In the five years prior to his termination Complainant advanced two (one) levels. Under the historical model, Complainant argues in the eight years since his termination he would have advanced six (three) levels. This does not seem reasonable, especially in light of corporate down-sizing and reductions in middle management positions in all industries during this period.

GPC has experienced down-sizing and Complainant held an executive level position. Wilkinson testified that most employees who reach a level 20 (10) position do not advance as there are very few positions in levels above 20 (10). It is impossible to determine with absolute certainty what would have happened in the last eight and a half years had Complainant not been unlawfully terminated. It is possible Complainant could have received a promotion in that time. It is equally possible that, even absent discrimination, he would have accepted a position at a lower level of

compensation. I find it reasonable to assume, in fashioning a complete remedy for Complainant, that he would have remained at the same level for the entire period.

Therefore, I find that Complainant is entitled to reinstatement in a level 20 (10) position with all benefits accorded others at the same level including, but not limited to, salary, benefits, office space, parking privileges, staff, and training opportunities.

C. Monetary Damages

1. Back Pay

The purpose of a back pay award is to make Complainant whole, that is to restore him to the same position he would have been in but for discrimination by Respondent. Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct 20, 1991). Back pay is measured as the difference "between actual earnings for the period and those she would have earned absent the discrimination by the defendant." Horn v. Duke Homes, 755 F.2d 599, 606 (7th Cir. 1979). Complainant has the burden of establishing the amount of back pay that Respondent owes. Pillow v. Bechtel Constr., Inc., 87-ERA-35 at 13 (Sec'y July 19, 1993). However, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating [party]. Johnson v. Bechtel Constr. Co., 95-ERA-11 at 2 (Sec'y Sept. 11, 1995); EEOC v. Enterprise Ass'n Steamfitters Local No. 638, 542 F.2d 579, 587 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), *quoting* Hairston v. McLean Trucking, 520 F.2d 226, 233 (4th Cir. 1975). The courts permit the construction of a hypothetical employment history for Complainant to determine the appropriate amount of back pay. UTU v. Norfolk & Western Ry., 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

Complainant is entitled to all promotions and salary increases which he would have obtained, but for the illegal discharge. Robinson v. City of Fairfield, 750 F.2d 1507, 1512 (11th Cir. 1985). I do not credit Complainant's testimony that he would have been promoted each time he reached the top of the salary scale for each level. On this issue I find Wilkinson more credible. He testified that it is not automatic for an employee to receive a level increase upon reaching the maximum salary for his/her level. He indicated that such a promotion required the opening of another position at a higher level.

Back pay may be calculated "using the wages of a representative employee, which can be an acceptable method of approximating what a complainant would have earned but for the discrimination." Hamilton v. Sharp Air Freight Services, Inc., 91-STA-49 at 2-3 (Sec'y Nov. 25, 1992). As stated above, I do not find Bowers to be a comparable employee and do not find this method of back pay calculation is of assistance in reaching a reasonable conclusion.

Respondent should pay back pay to Complainant equal to the midpoint for a level 20 (10) employee from the date of his termination to the date of his reinstatement.[104] Both parties have agreed that Steven Wilkinson, compensation manager for Southern Company Services, will perform calculations based on this order. He has at his disposal the average funding level for all bonus plans and the midpoint base salary for an individual at level 20 (10).

a. **Mitigation**

Once the Complainant establishes the gross amount of back pay due, the burden shifts to the Respondent to prove facts which would mitigate that liability. NLRB v. Browne, 890 F.2d 605, 608 (2d Cir. 1989).

Mitigation of damages by seeking suitable employment is a duty of victims of employment discrimination. Interim earning or an amount earnable with reasonable diligence are reductions to a back pay award. A complainant may be "expected to check want ads, register with employment agencies, and discuss potential opportunities with friends and acquaintances." Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996), *quoting* Helbing v. Unclaimed Salvage & Freight Co., Inc., 489 F.Supp. 956-963 (E.D. Pa. 1989), *quoting* Sprogis v. United Air Lines, 517 F.2d 387, 392 (7th Cir. 1975). Respondent has the burden of establishing that the back pay award should be reduced because Complainant did not exercise diligence in seeking and obtaining other employment. West v. Systems Applications International, 94-CAA-15 (Sec'y Apr. 19, 1995). Complainant is not held to "the highest standards of diligence," but to reasonable efforts considering the "individual characteristics of the Claimant and the job market." Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983).

The Secretary held that any offers of employment by GPC, prior to Complainant's termination, were hollow and unauthorized and that they were not for comparable employment so Complainant was under no obligation to accept them. Hobby v. Georgia Power Company, 90-ERA-30 at 26, (Sec'y Aug. 4, 1995). Respondent offers this same evidence to show that Complainant did not properly mitigate his damages by refusing offers of employment with GPC. *There were no meaningful offers of employment with GPC*. It is illogical to find that Complainant failed to mitigate damages on the basis of refusing non-existent offers. Therefore, I find this testimony unconvincing. Along a similar vein, GPC points to Complainant refusal to accept a severance package which required signing a release and settlement of all claims. Complainant is not required to waive this claim to show mitigation.

Comparable employment must afford Complainant with virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status. Rasimas, 714 F.2d at 624. "The un- or underemployed complainant need not go into another line of work, accept a

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[104]This amount should be increased each year on March 1, the date of yearly salary increases, by 4%, the average employee salary increase, to reflect the increasing midpoint (except 1990 when salary increases became effective April 1) (Tr. 548).

demotion, or take a demeaning position." Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 102 S. Ct. 3057, 3065 (1982), *See* OFCCP v. WMATA, 84-OFC-8 at 3 (Sec'y Aug. 23, 1989).

The United States Supreme Court has held that plaintiffs seeking an award of back pay have a duty to minimize damages "by being reasonably diligent in seeking employment *substantially equivalent* to the position . . . lost." Ford Motor Co., 458 U.S. 219 (emphasis added). To meet its burden, Respondent must show that there were substantially equivalent positions available, *and* Complainant failed to use reasonable diligence in seeking these positions. Rasimas v. Mich. Dept. Of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983) (emphasis added) *citing* Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1979); Oliver v. Hydro-Vac Services, Inc., 91-SWD-1 (ALJ Feb. 19, 1997), *aff'd in part* (ARB Jan. 6, 1998).

Complainant testified that his time spent pursuing this matter severely hindered his employment search capabilities. "An employee who has been the target of an unfair labor practice need not choose between mitigation of damages and the vindication of his statutory rights." NLRB v. Pilot Freight Carriers, Inc., 604 F.2d 375, 378 (5th Cir. 1979) (The complainant did not seek alternate employment for nine months because of required attendance at hearings and depositions.); Moyer v. Yellow Freight Systems, Inc., 89-STA-7 at 8 (Sec'y Aug. 21, 1995). The Eleventh Circuit has held that a plaintiff's duty to seek employment diligently is not extinguished by his tenacious pursuit of the former position through legal recourse, nor is such duty extinguished by his subsequent interest in non-employment pursuits. In addition, the Eleventh Circuit has held that, although a Title VII plaintiff is not obligated initially to seek work outside of his field to mitigate damages, such plaintiff becomes obligated to seek employment in another field once he has decided that no other job in his field would suit him. Walters v. City of Atlanta, 803 F.2d 1135, 1145 (11th Cir. 1986).

An employee can abandon the search after a reasonable period without jeopardizing the right to receive full back pay. Nord v. United States Steel Corp., 758 F.2d 1462, 1471-2 (11th Cir. 1985) (After Nord unsuccessfully searched for employment for two and a half years, she sought to secure other future employment); *Cf.* Brady v. Thurston Motor Lines, 753 F.2d 1269 (4th Cir.1985)(plaintiff who unsuccessfully searched for substantially equivalent employment for one year was justified in accepting lesser employment and going to school full time, even though he no longer actively sought employment substantially equivalent to job he lost due to discrimination.); J.H. Rutter Rex Manufacturing Co., Inc. v. NLRB, 473 F.2d 223, 242 (5th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973) ("by 'lowering their sights' and accepting what might have been the best job available, the claimants were doing all that could reasonably be expected of them by way of mitigation").

Respondent offers the testimony and report of James Cimino to show both prongs of the Rasimas test - that positions were available and the Complainant failed to use reasonable diligence to obtain these positions. Rasimas, 714 F.2d at 624. As an initial matter, I question Respondent's motives in choosing not to provide the Secretary of Labor's August 1995 decision to Cimino in forming his opinion. This act corroborates the conclusion of Dr. Jackson that Cimino was merely creating research to achieve a foregone conclusion. I find Dr. Jackson's analysis of Cimino's

methodology credible. Therefore, I give little weight to the conclusions reached by Cimino. However, in the interests of creating a thorough record I address those conclusions.

Cimino's statement that whistleblowing activity could be seen as a "plus" to a future employer is completely incredible. The research and testimony of both Dr. Glazer and Dr. Soeken rebut this baseless statement. In addition, ADM Wilkinson, who has worked in the nuclear industry testified that whistleblowing activity was, in fact, a "minus" to future employers. Griswold also testified that the events leading to one's termination were certainly relevant in obtaining future employment and that a pending discrimination lawsuit against one's former employer could be "very negative." Griswold and ADM Wilkinson both indicated that the nuclear industry was particularly tight knit where top executives at different companies often communicated with each other.

Cimino testified that through diligent search, Complainant could have obtained suitable employment within one year of his termination. However, Cimino indicated that 90 percent of the executive positions in the power industry were filled through networking. Complainant had seen the negative effects of his attempt at networking. Former supervisors would not even return his phone calls much less provide him with an advantage in obtaining future employment. Griswold testified that he also expected Complainant to be successful in his job search, and was surprised when he was not offered even an interview through his work with R.L. Stevens. I credit Griswold's testimony concerning Complainant's efforts. It is true that most of his information was received through Complainant, but Griswold has nineteen years of experience in this field and did not notice any of the signs of an individual who was failing to implement the marketing plan.

Addressing Cimino's suggestions, Griswold stated that it was not productive to make follow-up calls to recruiters and employers targeted from advertisements, and to place "situation wanted" advertisements. Further, Griswold indicated that "cold calling" potential employers was ineffective.

Cimino's "strawman" study suffered from major methodological defects, pointed out by Dr. Jackson. The study did not show indicia of reliability and validity. Most notably, the "strawman" was described as being down-sized. Even describing Complainant in this most favorable light, only seven of 114 companies were even interested in seeing his resume.

Further, I agree with Griswold that it would not have been in Complainant's best interest to respond to most of the advertisements listed by Cimino. Many of the positions listed by Cimino are at a substantial pay cut and not in the power industry, which is a substantial part of Complainant's experience. He is not initially required to seek these positions. Many of the advertisements are so vague as to be impossible to determine if they are for comparable employment. Dr. Staller states that Complainant could have obtained employment within one month of his termination at a salary of $70,000, which is 30% less than he was earning with Respondent. This is not comparable employment. He based these conclusions, in part, on the Survey of Displaced Workers. Dr. Jackson testified that employees in Complainant's situation, terminated whistleblowers, would not be included in this data and it was, thus, only a "best case" scenario. In addition, Dr. Staller indicated that his findings, based on assumptions and statistics, was not as reliable as fact specific conclusions.

Respondent offered complainant the services of an executive search firm, Payne-Lendman. Complainant did not accept this offer as he was under the impression that to do so required his waiving any causes of action against Respondent. In addition, Complainant did not trust Respondent due to its recent actions and did not want to rely on an agent of Respondent to find him a new position. I find Complainant's conclusions, regarding this offer, reasonable. Respondent claims that there was no contingency on the acceptance of this term, but it is not clear from any of the testimony or documents produced that such was expressed to Complainant. It was reasonable of Complainant to conclude that this offer was part and parcel of the severance package offered.

Complainant did seek the services of an executive search firm, R.L. Stevens. Complainant testified that through R.L. Stevens he sent out resumes, cover letters and marketing letters to other executive search firms, but did not keep all copies of such letters. I find this testimony credible. At the time of his involvement with R.L. Stevens, in 1992, Complainant had no idea that the Secretary would remand this matter and he would be asked to produce copies of all employment search contacts, although Griswold did advise him to do so. Complainant's assertions were corroborated by Griswold who testified that the listed applications amounted to only 1/3 of those sent by Complainant. Griswold worked closely with Complainant and found him to be conscientious and hard-working.

Complainant testified that pursuit of this lawsuit was full-time endeavor. However, beginning shortly after his termination, Complainant began making contact with Oglethorpe Power Company. I give very little weight to the letters from Respondent's Counsel to Kilgore, Self and Smith concerning their understanding of the situation with Complainant. I do credit Complainant's testimony that his understanding was that he would have a position once the initial hearing in this matter was over. Complainant met with Kilgore, Self, Wreath and Smith on several occasions and was informed that there was no reason why he could not be hired by Oglethorpe. Because of support from individuals at Oglethorpe during his initial protected activity, Complainant felt that this was his best chance for re-employment within the nuclear industry. In August 1991, Complainant applied to Oglethorpe for a position from a newspaper advertisement. This position reported to the VP of power production, a position Complainant was offered prior to his termination by Respondent.[105] However, he also explored other avenues through McGrath, O'Conner, Sillin, Miller, and ADM Wilkinson. By early 1992, Complainant had seen the negative results achieved by using his contacts within the industry. It is understandable that, after being fired by Respondent, Complainant was hesitant to use his contacts with employees of Respondent to obtain other positions.

ADM Wilkinson informed Complainant that his whistleblowing activities would make it very difficult for him to find employment in the nuclear industry. Respondent feebly argues that ADM Wilkinson is not knowledgeable about the industry and his opinion should not be credited.[106] I

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[105]Although the position was advertised, it was offered to a current employee at Oglethorpe.

[106]Respondent mischaracterizes ADM Wilkinson's deposition testimony stating, "He admitted that his involvement with the nuclear industry was "minimal" and his familiarity with the industry consisted primarily of

disagree. ADM Wilkinson has consulted with several power generation facilities. He was named the first President of INPO, an organization, formed by the nuclear power industry, to enhance safety at nuclear power plants.

In late 1992, Complainant became frustrated with the search for executive employment and began work for a temporary agency. He continued to respond to advertisements for executive employment, but needed to have an income in order to provide living expenses for himself. Complainant further illustrated diligence by his actions with regards to companies to which he was assigned by the temporary agency. At each company, Complainant would apply to the personnel office for a permanent position immediately. He was almost uniformly informed that he was over-qualified for available positions.

I find the testimony of Dr. Glazer particularly credible. Dr. Glazer conducted an in-depth study of whistleblowers and concluded that it was extremely difficult for a whistleblower to obtain comparable employment especially in the same industry. Upon review of documents in this case, notably the binding decision by the Secretary, Glazer testified that Complainant's case seemed to parallel those in her study. Dr. Glazer testified that personal contacts made obtaining a new position easier. Complainant attempted to use several of his contacts and was summarily shut out.

Respondent claims that there is no evidence that other companies knew of Complainant's actions. However, Respondent itself issued a press release indicating that Complainant had filed a claim against GPC for wrongful termination and that the ALJ had dismissed the claim (CX-52). Representatives of Respondent served in influential positions with both INPO and NUMARC, important industry organizations. Of particular note is Complainant's testimony that two of his former secretaries contacted him following his termination to express their concern. Complainant did not inform these individuals of his termination, but both had connections to the industry through NUMARC and Commonwealth Edison.

I find the conclusions and research of Dr. Jackson and Dr. Glazer to be based on solid evidence and not colored by the bias indicated in the conclusions of Cimino and Dr. Soeken.[107] Based on the evidence presented, I find that Respondent has failed to carry its burden of showing that Complainant failed to mitigate his damages. Complainant carried out a diligent search for employment. Cimino's report includes some advertisements for which Complainant could have applied, but Respondent's burden is not met by merely pointing out that Complainant did not apply to *every* available employer. Complainant did reply to at least forty employers and almost certainly more than that. Only after several years of disappointment and rejection did he settle for a position

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reviewing publications." Respondent's Brief at 35. ADM Wilkinson characterized his involvement in the industry in this way **only after his retirement** (CX-44, 39).

[107]I have not considered Dr. Soeken's opinion in this section as I found it so fraught with bias that it was implausible. Dr. Soeken's opinion seemed to indicate that no whistleblower could ever expect to find another position. A claim which is not supported by the evidence in this matter.

paying substantially less than the one from which he was terminated. It was reasonable for Complainant to cultivate his contacts with Oglethorpe Power for some time because a position with that organization would have provided him with similar compensation and status. It was reasonable to devote considerable time to the pursuit of this lawsuit. I find credible Complainant's claim that he no longer has many of the resumes and contacts made during his unemployment. Complainant was not in search of an entry-level position, which would have been easy to come by. He sought comparable executive employment, with his status as a whistleblower, lack of references from his previous employer, and lack of networking contacts in tow.

b. **Later Lawful Separation**

Back pay liability ends when a complainant's permanent employment would have ended for reasons independent of the violation found. Artrip v. Ebasco Services, Inc., 89-ERA-23 at (ARB Sept. 27, 1996). Blackburn v. Martin, 982 F.2d 125, 129 (4th Cir. 1992), *aff'g* Blackburn v. Metric Constructors, Inc., 86-ERA-4 at 4 (Sec'y Oct. 30, 1991); Blake v. Hatfield Elec. Co., 87-ERA-4 at 14 (Sec'y Jan. 22, 1992); Francis v. Bogan, Inc., 86-ERA-8 at 6 (Sec'y Apr. 1, 1988).[108] Complainant is entitled to a presumption that he would have been the last employee in his work group laid off. Nichols v. Bechtel Constr., Inc., 87-ERA-44 at 6 (Sec'y Nov. 18,1993), *aff'd* Bechtel Constr. Co. v. Secretary of Labor, 50 F.2d 926 (11th Cir. 1995). The cases require some explicit act or concrete event to cut off back pay or extinguish the right to reinstatement. See, Ford Motor Co. v. EEOC, 458 U.S. 219, 231-2 (1982); Knickerbocker Plastic Co., 132 NLRB No. 1209 (1961). Respondent has the burden of showing that Complainant would not have been retained in some other capacity. Archambault v. United Computing Systems, Inc., 786 F.2d 1507, 1515 (11th Cir. 1986).

Georgia Power has admitted that the analyses prepared by its witness, Shearer Folsom, were seriously flawed. Winkler based his conclusions on down-sizing on this flawed analysis. Because of this flawed basis, Winkler's conclusions are also highly suspect.

Respondent points to the fact that NOCA was eliminated and all functions reassigned to other sections. However, this action was taken in connection with the very discrimination at issue here. The other three employees of NOCA were reassigned within the new organizations and the duties of general manager, Complainant's former position, were absorbed into and consolidated with other organizations. Representatives of GPC testified that executives could be placed in positions for which they were not the most qualified, but for developmental purposes.

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[108]I note here that many of the previous cases, in which this issue arose, dealt with employees who were hired as contractors, temporary employees, or were employees subject to lay-off. *See*, Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996); Creekmore, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996); Beck v. Daniel Constr. Co., 86-ERA-26 (Sec'y Aug. 3, 1993); Nichols v. Bechtel Constr., Inc., 87-ERA-44 (Sec'y Nov. 18, 1993) aff'd sub nom Bechtel Construction Co. v. Secretary of Labor, 50 F.2d 926 (11th Cir. 1995); Blake v. Hatfield Electric Co., 87-ERA-4 (Sec'y Jan. 22, 1992).

It is impossible to determine with any certainty what could have, would have, or may have happened absent Respondent's discrimination. Prior to his protected activity Complainant enjoyed a good reputation and positive appraisals from his supervisors. Dr. Staller indicated that based on Complainant's low final evaluation, he was likely to be downsized. This rating was part of the discrimination found by the Secretary and cannot be considered in determining if Complainant would have been subject to down-sizing. His previous performance evaluations had been high. The most persuasive evidence in the record is the statement by Winkler that Complainant was the *only* employee at a level 19 (10) or higher who was involuntarily separated from GPC as a result of downsizing efforts. It is absurd to believe that had Complainant remained with GPC that he would have been the first and only executive employee to be involuntarily terminated absent any discrimination. This remains true regardless of whether NOCA was later eliminated or not.

c. **Salary Increases or Promotions**

As stated above, I find that Complainant has not shown that he would have received any promotions had he not been terminated in 1990.

The parties have stipulated to the interest rates on any past due amounts. Complainant has calculated the interest on a compounded daily basis. Interest on back wages is calculated in accordance with 29 C.F.R. §20.58(a) at the rate specified in the Internal Revenue Code, 26, U.S.C. §6621, and is compounded quarterly. Willy v. The Coastal Corporation and Coastal States Management Co., 85-CAA-1 at 12 (ALJ May 8, 1997); OFCCP v. WMATA, 84-OFC-8 (Ass't Sec'y Aug. 23, 1989), *motion for recon. den.*, (Ass't Sec'y Nov. 17, 1989); Blackburn v. Metric Constructors, 86-ERA-4 (Sec'y Oct. 30, 1991).

2. **Vacation Time**

Complainant seeks reinstatement of his vacation time instead of reimbursement for the cash value of this time. I find that such action is not compatible with Complainant's goals of reintegrating into Respondent's organization. It seems most reasonable to provide Complainant with the cash value of his lost vacation time.

3. **Car Allowance**

Prior to being discharged Complainant had use of a company car. The company car benefit included the car, gasoline for the car and maintenance. Had Complainant remained with GPC beyond April 2, 1990, he would have been assigned a mid-sized car from 1990 through October 31, 1993, when GPC discontinued its practice of assigning vehicles to Company officers and managers. If Complainant was still employed by the company at that time, he would have received a payment of $7,400 plus $2,957 to cover federal and state taxes on the $7400 payment. Complainant was assessed (as additional income) for his automobile in 1987-1989 as follows: 1987 - $3520; 1988 - $3507; and 1989 - $3442 (Stipulation No. 9). Respondent does not challenge the car allowance which Complainant has calculated is due him. Respondent's Brief p. 63.

4. **Medical Benefits**

Complainant is entitled to compensation for medical expenses incurred because of termination of medical benefits, including premiums for medical coverage. Creekmore, 93-ERA-24 at 12 (Dep. Sec'y Feb. 14, 1996). Complainant should be compensated for the actual cost of health insurance since his unlawful termination.

5. **Life Insurance**

Complainant should be compensated for the actual cost of life insurance since his unlawful termination.

6. **Retirement Programs, ESP, ESOP, Stock Options**

Complainant is entitled to full restoration of retirement and pension benefits and any stock option plans that were adversely affected by the discriminatory conduct. Boytin v. Pennsylvania Power and Light Co., 94-ERA-32 at 12 (Sec'y Oct. 20, 1995). Any employee contributions to these plans will be paid by Complainant within ten days of receipt of the back pay award.

7. **Productivity Improvement Plan (PIP); Performance Pay Plan (PPP)**

Complainant calculates his PPP award equivalent to the highest awarded that year. I find that unreasonable. Complainant should receive PIP and PPP bonuses equal to the average award provided to level 20(10) employees for the time period since his termination.

8. **Compensatory Damages**

Where a violation has been found, section 5851(b)(2)(B) of the act permits the award of compensatory damages in addition to back pay. 42 U.S.C. §5851 (b)(2)(B); 29 C.F.R. §24.6; Blackburn v. Metric Constructors, Inc., 86-ERA-4 at 9 (Sec'y Oct. 30, 1991). Such awards may be awarded for emotional pain and suffering, embarrassment, and humiliation. The testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant's case for entitlement to compensatory damages. Thomas v. Arizona Public Service Co., 89-ERA-19 at 14 (Sec'y Sept. 17, 1993); Mosbaugh v. Georgia Power Co., 91-ERA-1 & 11 at 18 (Sec'y Nov. 20, 1995); Busche v. Burkee, 649 F. 2d 509, 519 n.12 (7th Cir. 1981), *cert. denied* Burkee v. Busche, 454 U.S. 897 (1981). The Secretary has held that an important criterion for determining whether an award of compensatory damages is reasonable is "whether the award is roughly comparable to awards made in similar cases." Smith v. Esicorp., Inc., 93-ERA-16 at2-4 (ARB Aug. 27, 1998) *citing* Gaballa v. The Atlantic Group, 94-ERA-9 at 6 (Sec'y Jan. 18, 1996) *quoting* EEOC v. AIC Security Investigations, Ltd., 55 F3d 1276, 17285 (7th Cir. 1995).[109] In the 11th Circuit "once liability has been

[109]See,

- Van der Meer v. Western Kentucky University, 95-ERA-38, (ARB Apr. 20, 1998) (The ARB awarded Van der Meer, a tenured Associate Professor in the Department of Physics and Astronomy, $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.);
- Gaballa v. The Atlantic Group, 94-ERA-9 at 5 (Sec'y Jan 18, 1996) (Gaballa, a contract engineer, had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary

found, the [court] has a great deal of discretion in deciding the level of [compensatory] damages." Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985)(upholding a $100,000.00 compensatory damage award).[110]

As the Secretary explained in Lederhaus v. Paschen:

> Complainant must prove the existence and magnitude of subjective injuries with "competent evidence." Carey v. Piphus, 435 U.S. [247 (1978)] at 264 n.20. The testimony of medical or psychiatric experts is not necessary, however, although it can strengthen a Complainant's case. . . . As the Supreme Court noted in Carey v. Piphus, 435 U.S. at 264 n.20, "[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others."
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> 91-ERA-13 at 10 (Sec'y Oct. 26, 1992)

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reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from $10,000 to $50,000, and awarded Gaballa $35,000.);

- Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 at 25 (Dep'y Sec'y, Feb. 14, 1996) (The Deputy Secretary awarded Creekmore, a manager of quality services, $40,000 for emotional pain and suffering caused by a discriminatory layoff. Creekmore showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company.);
- Smith v. Littenberg, 92-ERA-52 at 7 (Sec'y Sept. 6, 1995); (The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional stress caused by discriminatory discharge where Smith, the chief nuclear medicine technologist supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems.");
- Blackburn v. Metric Constructors, Inc., 86-ERA-4 at 5 (Sec'y Aug. 16, 1993) (The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.);
- Lederhaus v. Paschen, 91-ERA-13 at 10 (Sec'y Oct. 26, 1992) (The Secretary awarded Lederhaus, a radiography technician, $10,000 for mental distress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted. Lederhaus was unemployed for five and one half months.);
- DeFord v. Tennessee Valley Authority, 81-ERA-1 at 3 (Sec'y Apr. 30, 1984) (The Secretary reduced the ALJ's award of $50,000 to DeFord to $10,000 indicating that DeFord had not shown any damage to his reputation or removal from professional societies.);
- Doyle v. Hydro Nuclear Services, 89-ERA-22 (ALJ Nov. 7, 1995), *aff'd* (ARB Sept. 6, 1996) (Respondent failed to hire Complainant because he would not sign a release for a background check resulting in Complainant's inability to obtain employement. The ALJ awarded $40,000 in compensatory damages.)

[110] In Stallworth, the court upheld damages for humilation and emotional distress, even though the employee had not been discharged, had not sought any "professional help" and had not "slipped" in his relationship with "coworkers." Stallworth, 777 F.2d at 1435.

Interest is not awardable on compensatory damages. Smith v. Littenberg, 92-ERA-52 at 5 (Sec'y Sept 6, 1995).

Complainant testified that after holding a position paying over $100,000 per year, he had to ask for money from his mother. He had worked hard to achieve success in his career. He was unable to provide for her in the way he would have liked during her final years of life. He had to ask for money from his friend and mentor, ADM Wilkinson. ADM Wilkinson testified that those debts were still outstanding. Complainant had to inform the family who had provided for his college education that he had been fired. Further, he had to endure a protracted job search with few positive aspects. Finally, Complainant had to accept a position as a file clerk to be able to pay his basic living expenses. This for a man with a college degree who had served in the executive offices of a major power generating corporation. In addition, he witnessed his friends, acquaintances and associates, one after another, turning from him and refused to even return simple messages.

In the context of arguing that reinstatement was not viable, witnesses for GPC testified that Complainant would face significant hostility and lack of professional respect upon his return. This is evidence that Complainant's reputation has been damaged by Respondent's unlawful action. Without a specific position in mind, Respondent argues that Complainant would be unable to fulfill his duties because of this animosity. Evans testified that he had lost respect for Complainant because of this lawsuit. It is necessary to this argument to assume that the executives within GPC are aware of Complainant's lawsuit and whistleblowing status and have formed negative opinions based on this.

I find ADM Wilkinson's testimony on this issue particularly compelling. He testified that the general attitude toward whistleblowers is negative. He observed that whistleblowers are seen as covering their own inadequacies with reports of wrongdoing. Several of the GPC executives commented that Complainant's performance reviews were low and prior high reviews were probably inflated. These opinions were offered regardless of whether the individual had worked directly with Complainant or not. ADM Wilkinson further testified that Complainant had an "infinitesimally small" chance of ever obtaining a high level executive position, following his protected activity. Prior to this, ADM Wilkinson had opined that Complainant was on track for just such an executive position.

Complainant's loss of reputation, in this matter, has led to a loss of future opportunities for growth within the company and for future earnings. Respondent should compensate him for this loss as well. Prior to the discrimination, Complainant was offered a VP position with Oglethorpe Power. Following the discrimination, Complainant's resume was not even forwarded out of human resources for a position which reported to the VP. Prior to his discrimination, ADM Wilkinson opined that Complainant was on track for a CEO position. Following the discrimination, ADM Wilkinson indicated that Complainant had no chance for such a position. CEO, and even VP, positions, provide salaries and benefits beyond what Complainant was earning prior to his termination. I do not credit the testimony of Cimino as to Complainant's suitability for CEO positions. As stated above, I find Cimino's methodology to be sorely lacking and his results questionable, at best.

In light of Complainant's high level position, his unemployment and underemployment for over eight years, his inability to find any work within the nuclear community, and the detrimental

effect his protected activity has had on any chances of future promotion and future salary increases, and in light of the emotional stress Complainant endured due to his termination and inability to find comparable employment, I find that an order of compensatory damages in the amount of $250,00.00 is reasonable. I recognize that this amount is higher than those awarded in other case, but I find that the situation here merits such a high award.

D. **Lost Equity**

The Deputy Secretary has found that penalties due to early distribution of retirement funds are not compensable because Complainant had "the choice" of allowing the funds to remain in the accounts. Creekmore, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996).[111]

I distinguish the instant matter from Creekmore. Hobby was terminated from an executive position and was without any employment for more than three years. It is not unreasonable or indicative of "panic" to withdraw these funds to pay living expenses. I find that Complainant was required to liquidate his retirement accounts due to his termination. Complainant should not be required to unreasonably lower his standard of living due to Respondent's discrimination. Complainant is entitled to the reinstatement of these accounts and to reimbursement for any tax penalties due to his early withdrawal of these funds.

Wilkinson demonstrated that Complainant's calculations improperly double counted interest to which he was entitled. Interest shall be calculated such that Mr. Hobby does not receive interest twice with respect to these funds.

E. **Affirmative Relief**

Complainant requests various affirmative relief necessary in achieving a "complete remedy." First, Complainant requests expungement and reconstruction of his employment records. Respondent should remove any negative references or commentaries regarding Complainant's work performance in connection with his discharge. See, Doyle v. Hydro Nuclear Services, 89-ERA-22 at 10 (ARB Sept. 6, 1996); Smith v. Littenberg, 92-ERA-52 at 5-6 (Sec'y Sept. 6, 1995). However, I do not find it necessary or proper to order Respondent to create a false employment report.

Complainant requests that Respondent issue a "welcome back" memorandum to announce his return to the company. Complainant testified that this was common practice in the corporation. As stated above, Complainant is to be reinstated with the same benefits and acknowledgments as any other new level 20 (10) position. This includes the issuance of such a memorandum.

It is not unusual for a court to order that the decision in employment discrimination cases be posted at the work facilities. Simmons, et al. v. Florida Power Corp., 89-ERA-28 & 29 at 22 (ALJ Dec. 13, 1989); Wells v. Kansas Gas & Electric Co., 83-ERA-12 at 12 (Sec'y June 14, 1984); Tritt

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[111]The Deputy Secretary considered Complainant's "panic" in dispersing these funds as evidence of the emotional turmoil that resulted from his discriminatory layoff. Creekmore, 93-ERA-24 at 14.(Dep. Sec'y Feb. 14, 1996).

v. Fluor Constructors, Inc., 88-ERA-29 at 6 (Sec'y March 16, 1995). In the instant case, I find that this is not in the best interests of Complainant.

Complainant requests that Respondent send an apology or this recommended decision and order to all employees or publish same in the company publications. Such would defeat Complainant's goal of throwing off the label of whistleblower and is likely to cause further animosity between Complainant and employees of Respondent. Complainant further seeks an order for Respondent to refrain from derogatory communications regarding Complainant. I find such an order unnecessary. Respondent is forbidden by the very act under which Complainant is currently suing from discriminating against Complainant because of his whistleblowing activities. This prohibition continues upon Complainant's reinstatement.

F. **Costs**

1. **Attorney Fees**

On June 26, 1998, I issued a scheduling order regarding the filing of attorney fee petitions and responses. The parties should adhere to this order.

2. **Other Costs**

Complainant is entitled to job search expenses for mailing, telephone and travel. Creekmore, 93-ERA-24 at 14 (Dep. Sec'y Feb. 14, 1996). Complainant is also entitled to costs for transportation to, and lodging and meals while attending the DOL hearing. Id.

Complainant is entitled to reimbursement for any employment search costs including the $2,450.00 paid to R.L. Stevens. Complainant is not entitled to the $1225.00 still owed to R.L. Stevens as he is no longer in need of their services and his contract with them was terminated upon his failure to make the final payment.

RECOMMENDED ORDER

It is hereby RECOMMENDED that:

1. Complainant is entitled to immediate reinstatement to a level 20 (10) position with Respondent.

2. Complainant is entitled to reinstatement of all perquisites and benefits of a level 20 (10) position, including, but not limited to, medical and life insurance, stock options, retirement programs, ESP, ESOP, PIP, PPP, office space, parking privileges, staff, "welcome back" memo, and training opportunities.

3. Complainant will be provided with any training necessary to re-assimilate him into his position.

4. Respondent shall provide Complainant with any training necessary to the completion of his duties in his reinstated position.

5. Complainant is entitled to back pay equal to the midpoint of a level 20 (10) position from the date of his termination to the date of reinstatement.[112]

6. Complainant is entitled to payment of all lost benefits including PIP and PPP bonuses at the midpoint of a level 20 (10) employee, plus interest.

7. Complainant is entitled to compensation for 19 weeks of vacation time, plus interest.

8. Complainant is entitled to $23,721.27 as compensation for loss of use of automobile benefits as provided by Respondent, plus interest.

9. Complainant is entitled to $20,384.21 for health and life insurance expenses, plus interest.[113]

10. Complainant is entitled to recreation of retirement, ESP, ESOP and stock option accounts.[114]

11. Complainant is entitled to $250,000 in compensatory damages for emotional distress, humiliation, and loss of reputation.

12. Complainant is entitled to expungement of any negative references or commentaries in his employment record.

13. Complainant is entitled to $6,3345.12 for repayment for tax penalties for early withdrawal of retirement account funds, plus interest.

14. Complainant is entitled to $3,605.31 for reimbursement of job search expenses, plus interest.

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the

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[112]For 1990, the midpoint was $102,408.00; for 1991 - $106,500.00; for 1992 - $110,232.00; for 1993 - $114,096.00; for 1994 - $116,376.00; for March 1 - June 1, 1995 - $118,704.00; for 1995 - $116,112.00; for 1996 - $118,440.00; and for 1997 - $120,804.00. Appendix D. Steven Wilkinson will be responsible for calculation and submission of the dollar figure for 1998 and this amount should be added to those above.

[113]This amount will have increased by $120.00 per month since April 15, 1998.

[114]Within ten days of receipt of these stock amounts and the payment of all back pay award, Complainant will reimburse Respondent for any employee contributions necessary to the creation of these accounts.

Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

DANIEL A. SARNO, JR.
Administrative Law Judge

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Newport News, Virginia